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PLEADING AND PRACTICE  
OF THE  
HIGH COURT OF CHANCERY.  
VOL. III.





PLEADING AND PRACTICE  
OF THE  
HIGH COURT OF CHANCERY.

BY THE LATE  
EDMUND ROBERT DANIELL,  
BARRISTER-AT-LAW.

*Sixth American Edition,*

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AND FIFTH AMERICAN EDITIONS.

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## APPENDIX OF FORMS.

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# APPENDIX OF FORMS.

## PART I.

### BILLS AND INFORMATIONS.

#### CHAPTER I.

##### FORMS OF TITLES, ADDRESSES, COMMENCEMENTS AND CONCLUSIONS OF ORIGINAL SUITS BY INFORMATION OR BILL.

###### SECTION I.—*Title*.<sup>1</sup>

###### 1.

*English.]*  
In Chancery.

Lord Chancellor.

Vice Chancellor.

[*or* the Master of the Rolls].

Between A. B.	. . . . .	Plaintiff.
C. D.	. . . . .	Defendant. <sup>2</sup>

<sup>1</sup> The title of the suit is a collection of the names of the plaintiffs, as they appear in the introductory part of the bill, and of the defendants as they are set forth in their proper order; and care should be taken that the names are the same in both cases. Where the plaintiff sues on behalf of himself and others, or is under disability, it is usual to state that fact in the title of the bill, and of the future proceedings in the cause; as thus:—

“Between John Lee, on behalf of himself and all other the creditors of A. B., deceased . . . plaintiff.”

*Or,*

“John Lee, a person of unsound mind, by C. D., the committee of his estate, and the said C. D. . . . plaintiffs.”

*Or,*

“John Lee, a person of unsound mind, not so found, by C. D., his next friend . . . plaintiff.”

*Or,*

“Jane Lee, wife of the defendant John Lee, by C. D., her next friend . . . plaintiff.”

Where also the defendant is stated to be out of the jurisdiction, or is named as a formal

party only, the title should so express it; as thus:—

“Henry Jones, out of the jurisdiction.”

*Or,*

“James Styles, to be bound upon service of a copy of the bill.”

It is not usual to state in the title of the bill that a defendant is under disability, but after a guardian *ad litem* of such defendant has been appointed, that fact should be stated in the title of all future proceedings; as thus:—

“James Styles, an infant, by Edward Styles, his guardian.”

*Or,*

“James Styles, a person of unsound mind, not so found, by Edward Styles, his guardian.”

*Or,*

“James Styles, and Amy, the wife of the said James Styles, by Edward Styles, her guardian.”

<sup>2</sup> See *ante* 152 n., 359, 360, 389, 405. The discussion of all matters of form will be found

## 2.

*English.*] To the Right Honorable Frederic, Baron Chelmsford, of Chelmsford, in the County of Essex, Lord High Chancellor of Great Britain.

## 3.

(*Where the Chancellor or person holding the seals is a party.*) To the Queen's Most Excellent Majesty, in her High Court of Chancery.

## 4.

*United States Circuit Courts.*] To the Judges of the Circuit Court of the United States for the District of ——. <sup>2</sup>

## 5.

*Massachusetts and Maine.*] To the Honorable the Justices of the Supreme Judicial Court, next to be holden [*or now sitting*] at —, within and for the County of —, and Commonwealth of Massachusetts [*or State of Maine*], &c.

Or, thus: —

To the Honorable the Justices of the Supreme Judicial Court, sitting in Equity.

## 6.

*New Hampshire.*] Rockingham, ss. To the Supreme Judicial Court.

## 7.

*Vermont.*] To the Honorable A. B., Chancellor of the First [*or Second or other*] Judicial Circuit. <sup>3</sup>

chiefly in the notes to the preceding pages of this work, in connection with the appropriate titles.

As to parties in some States, as, *e. g.*, in West Virginia, a bill may either follow the old Chancery practice or the form prescribed by the Code; but, even in these jurisdictions, it must do one or the other. Persons named in the caption of a bill or complaint are not thereby made parties, unless a different effect is provided for by statute. *Cook v. Dorsey* (W. Va.) 18 S. E. Rep. 468.

<sup>1</sup> The address should of course contain the appropriate and technical description of the Court, and must be varied accordingly. *Story Eq. Pl.* § 26. See *ante*, Vol. I. p. 357.

<sup>2</sup> 20th Equity Rule of the U. S. Courts.

<sup>3</sup> This form is in compliance with the 1st Chancery Rule in Vermont (11 Vermont, 689), which provides that "All bills in Chancery

shall be addressed to the Chancellor, within the judicial district where the same is to be heard." But the usual form of address in practice is "To the Court of Chancery next to be held at —, within and for the county of —," which is in strict compliance with the Statute of Vermont (Genl. Sts. of 1863, p. 249, § 18). The requirement of the statute is that "All bills and petitions in the Court of Chancery shall be addressed to the Court of Chancery in the county where such bills are required by law to be entered or shall be pending." And since, by an Act passed in 1856 (Session Laws of Vermont of 1856, p. 13, No. 7, § 6), all former laws providing for the division of the State into judicial districts were repealed, the form of address given in this note as the usual form is doubtless the correct one.



## 8.

*New Jersey.*] To the Honorable A. O. Z., Esq., Chancellor of the State of New Jersey. [See Dick. Ch. Prac. 89.]

\* SECTION III. — *Commencements.*

\* 1879

## 9.

*English, General Form.*] Humbly complaining sheweth [*or show*] unto his Lordship A. B., of, &c. [*or A. B., of, &c., and C. D., of, &c.*],<sup>1</sup> the above-named plaintiff [*or plaintiffs*].

## 10.

*Circuit Courts of the United States.*] “A. B., of —, and a citizen of the State of —, brings this, his bill, against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —, and thereupon your orator complains and says that,” &c.<sup>2</sup>

## 11.

*New Hampshire.*] “A. B., of, &c., complains against C. D., of, &c., and E. F., of, &c., and says,” &c.<sup>3</sup>

## 12.

*Massachusetts.*] Humbly complaining, sheweth unto your honors the plaintiff, F. A. L., now of D., in the County of N., and Commonwealth of Massachusetts, executor of the last will and testament of J. H. L., late of B., in the County of S., and Commonwealth aforesaid, physician, deceased, that the said J. H. L., in his lifetime, &c.

Or, thus:—

S. R., of B., in said County of S., merchant, and executor and trustee under the last will and testament of E. S., late of said B., widow, brings this, his bill [*or bill of complaint*] against J. E. H., of C., in the State of O., E. S. L., of B., in the State of M., and the — Company, a corporation duly established under the laws of Massachusetts; and thereupon the plaintiff complains and says, that the said E. S., by her, &c.

<sup>1</sup> See *ante*, Vol. I. p. 357.

<sup>2</sup> 20th Equity Rule of the U. S. Courts.

<sup>3</sup> In New Hampshire, “every bill in the introductory part shall contain the names, places

of abode, and proper description of all the parties, plaintiffs and defendants, by and against whom the bill is brought.” Chancery Rule, 2, 38 N. H. 605.

SECTION IV. — *Commencement in Special Cases.*

13.

*Husband and Wife.*] Humbly complaining, show, &c., A. B., of, &c., and C. B., his wife.

\* 1880

\* 14.

*Wife suing alone.*] Humbly complaining, &c., A. B., of, &c., wife of B. B., of the same place, by E. F., of, &c., her next friend.

15.

*Wife by next friend: husband a defendant.*] Humbly, &c., C. B., the wife of the defendant A. B., by E. F., of, &c., her next friend, the above-named plaintiff, as follows:

16.

*Same: Husband residing abroad.*] Humbly, &c., C. B., of (*residence*), the wife of A. B., who is now residing at G., out of the jurisdiction of this Honorable Court, by E. F., of, &c., her next friend, the above-named plaintiff, as follows:

17.

*Wife as a feme sole.*] Humbly, &c., C. B., of (*residence*), the wife of A. B., of, &c., suing as a *feme sole* [*or*, but who has obtained a statutory order for protection from her husband], the above-named plaintiff, as follows:

18.

*Infants.*] Humbly complaining, &c., A. B. and C. B., of, &c., infants under the age of twenty-one years, by E. F., their next friend.

19.

*Lunatics, &c.*] Humbly complaining, &c., A. B., of, &c., a lunatic [*or non compos mentis*], by E. F., of, &c., his guardian [*or* next friend, when plaintiff is of unsound mind, but not so found by inquisition] [*or* committee of the (person and) estate of the said A. B.], that, &c.

Or,

A. B., of, &c., by C. D., of, &c., committee of the [per-  
son and] estate of the said A. B., and the said C. D., &c.

## 20.

*Assignee of Insolvent Debtor.*] Humbly complaining, &c., A. B., of, &c., assignee of the estate and effects of C. D., &c., an insolvent debtor, &c.

## 21.

*A person deaf and dumb.*] Humbly complaining, &c., A. B., of, &c., being deaf and dumb, by C. D., of, &c. trustee, his next friend, &c.

## 22.

*Banking Corporation.*] Humbly complaining, &c., the President, Directors, and Company of, &c., a corporation duly established by law within the State [*or Commonwealth*] of, &c.

## \* 23.

## \* 1881

*Railroad Corporation.*] Humbly complaining, &c., The Boston and Worcester Railroad Corporation, &c.

## 24.

*Municipal Corporation.*] Humbly complaining, &c., The Mayor, Aldermen, and Commonalty [*or citizens*] of the City of, &c. [*or The City of, &c., or The Inhabitants of the Town or City of —*], in the County of, &c.

## 25.

*Foreign Corporation.*] Humbly complaining, &c., The Governor and Company of the Bank of Scotland [*or The Dutch West India Company*], &c.

## 26.

*Foreign Republican State.*] Complaining shew unto his Lordship, the United States of America, the above-named plaintiffs, &c.<sup>1</sup>

<sup>1</sup> *United States v. Wagner*, L. R. 2 Ch. 582; *United States v. Prioleau*, 2 H. & M. 559; *United States v. McKee*, L. R. 2 Eq. 327.

In suits by foreign monarchical States, the sovereign sues as the person in whom the public property is vested for the benefit of the State. *United States of America v. Wagner*, Law Rep. 2 Ch. Ap. 582, p. 587, per Lord Chelmsford, p. 592, per Sir G. J. Turner, L. J., pp. 593, 594, per Lord Cairns; *Emperor of Austria v. Day*, 3 D. F. & J. 217; *King of Spain v. Machado*, 4 Russ. 225; *King of Two Sicilies v. Willcox*, 1 Sim. N. S. 301.

In a Republic, on the other hand, the sovereign power, and with it the public property, is held to remain and reside in the State itself, and not in any officer of the State. It is from the State that an ambassador is accredited, and it is with the State that the diplomatic intercourse is conducted; and, in such case, the suit is not to be brought in the name of the President, but in that of the State. *United States v. Wagner*, Law Rep. 2 Ch. 593, 594, per Lord Cairns.

27.

*Creditor, suing on behalf of himself and others.*] A. B., of, &c., on behalf of himself and all other unsatisfied creditors of E. F., &c., who shall come in and contribute to the expenses of this suit, &c.

28.

*Shareholders in a Company.*] A. B., of, &c., on behalf of himself and all other the shareholders [except the defendants hereto] in a certain company called "——."

29.

*Attorney-General on behalf of the Government.*] Informing sheweth, &c., C. A., &c., Attorney-General of the State [*or Commonwealth*] of, &c., on behalf of the said State [*or Commonwealth*], &c.

\* 1882

\* 30.

*Same where there is a Relator.*] Informing sheweth, &c., C. A., &c., Attorney-General, &c., at and by the relation of the Rector, Wardens, and Vestry of —— Church in L., &c., for and in behalf of themselves and the rest of the Parishioners, &c.

31.

*Same where the Case is by Information and Bill.*] Informing, &c., at and by the relation of A. B., of, &c., and C. D., of, &c. and also humbly complaining, show, &c., the said A. B. and C. D., &c.

32.

*Same, on behalf of a Lunatic.*] Informing sheweth C. A., Attorney-General of the State, &c., on behalf of D. F., of (*residence*), a lunatic, at and by the relation of O. P., of (*residence and addition*), as follows:

SECTION V. — *The Premises or Stating Part (after narrating the facts and circumstances of the plaintiff's case) concludes.*<sup>1</sup>

33.

And your orator [*or the plaintiff*<sup>2</sup>] hoped that the said C. D. [the defendant] would have complied with the reasonable requests of your orator [*or the plaintiff*] as in justice and equity he ought to have done.

<sup>1</sup> In regard to the stating part of the bill, see ante, Vol. I. p. 360 *et seq.* are omitted they shall be referred to as *plaintiffs* or *defendants*." Modern English bills

<sup>2</sup> By 7th Chancery Rule in New Hampshire it is provided that, "when the names of parties employ the terms "plaintiff" and "defendant" throughout.

SECTION VI. — *The Charge of Confederacy.*<sup>3</sup>

34.

BUT NOW SO IT IS, may it please your honors [*or your honor*], that the said R. H., combining and confederating with divers persons [*or if there are several defendants, then thus* — combining and confederating \* together and with divers persons] at present un- \* 1883 known to your orator [*or the plaintiff*] whose names, when discovered, your orator [*or the plaintiff*] prays he may be at liberty to insert herein with apt words to charge them as parties defendants hereto, and contriving how to wrong and injure your orator [*or the plaintiff*] in the premises, he, the said R. H., absolutely refuses to comply with such requests, and he at times pretends that, &c.

*Another form.*

But now so it is, may it please your honors [*or your honor*], that the said R. H., L. M., and N. M., in concert with each other, allege that, &c. [*or colluding and confederating with each other, refuse to comply with such requests, and pretend that, &c.*].

SECTION VII. — *The Charging Part.*<sup>1</sup>

35.

Whereas, your orator [*or the plaintiff*] charges the contrary to be the truth, and that, &c.

SECTION VIII. — *The Jurisdiction Clause.*<sup>2</sup>

36.

All which actings, doings, and pretences of the said defendant [*or defendants*] are contrary to equity and good conscience, and tend to the

<sup>3</sup> It was formerly customary in almost every bill to introduce a general charge of confederacy against the defendants. But there is no such statement in the model of a bill given in England by the general orders of 1852, and it is scarcely necessary to say that such a charge would now in that country be deemed idle and impertinent, except under very special circumstances. This charge is said to be wholly unnecessary, and to be treated as mere surplusage in Story Eq. Pl. § 29. By the 21st Equity Rule of the U. S. Courts, it is provided that: "The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff." By the 7th of the Equity Rules of Massachusetts: "The common charge of fraud and com-

bination shall be omitted, except when it is intended to charge fraud and combination specifically." So by the 1st of the Chancery Rules in Maine: "The formal averments of combination and pretence shall be omitted." So by the 2d of the Chancery Rules in New Hampshire, the Common Confederacy Clause may be omitted.

<sup>1</sup> See the 21st Equity Rule of the U. S. Courts, stated *post*, p. 2380. By the 3d of the Chancery Rules in New Hampshire, the charging part of the bill may be omitted. In Massachusetts, the plaintiff may, when his case requires it, allege, by way of charge, any particular fact, for the purpose of putting it in issue. 7th Chancery Rule. The model of a bill given in schedule to orders of Aug. 7th, 1852, in England, contains no charging part.

<sup>2</sup> See the 21st Equity Rule for the U. S.

manifest wrong, injury, and oppression of your orator [*or the plaintiff*] in the premises. In tender consideration whereof, and forasmuch as your orator [*or the plaintiff*] is remediless in the premises, at and by the strict rules of the Common Law, and is relievable only in a Court of Equity, where matters of this nature are properly cognizable and relievable. To the *end*, therefore, &c.

\* 1884

\* SECTION IX. — *Interrogating Part.*<sup>1</sup>

37.

To the *end*, therefore, that the said C. D., E. F., and G. H., and their confederates, when discovered, may, *upon their several and respective corporal oaths*, to the best and utmost of their respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid [*or if an answer on oath is meant to be waived, omit the words in italics, and insert at this place (your orator, or, the plaintiff, hereby waiving, pursuant to the statute, the necessity of the answer of such defendants, being put in under the oaths of the said defendants, or the oath of either of them)*], and that as fully and particularly as if the same were here repeated, and they and every of them distinctly interrogated thereto, and more especially that they may, in manner aforesaid, answer and set forth whether, &c. [*Here insert the interrogatories to be answered by the defendants, directing what interrogatories are to be answered by each.*]

Or, in the Circuit Court of the United States thus:

"To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, they are respectively required to answer, that is to say, —

"1. Whether, &c.

"2. Whether, &c." <sup>2</sup>

Courts, *post*, p. 2380. The plaintiff may omit this clause by the 3d of the Chancery Rules in New Hampshire. A precise averment of jurisdiction in the Court is now obsolete in England, and was never absolutely requisite.

<sup>1</sup> By the 3d of the Chancery Rules in New Hampshire, the plaintiff may omit the prayer for an answer and for answers to interrogatories, except where he relies on the discovery of the defendant. In Maine, "A general interrogatory only shall be introduced into the bill, and it shall be sufficient to require a full answer to all the matters alleged." 1st Chancery Rule. And by 8th Chancery Rule in Massachusetts: "The defendant shall be required to answer fully, directly, and particu-

larly to every material allegation or statement in the bill, as if he had been thereto particularly interrogated." By the 7th Rule, in this State, the plaintiff, when his case requires it, may propose specific interrogatories. It is now precisely enacted, in England, "that the bill of complaint shall not contain any interrogatories for the examination of the defendant." 15 & 16 Vic. c. 86, § 10; but by § 12, if the plaintiff, in a suit commenced by bill, shall require an answer, he may file interrogatories in the proper office of the Court, and no defendant shall be required to put in any answer to a bill unless interrogatories have been so filed, &c. See *ante*, Vol. I. p. 374.

<sup>2</sup> The 43d Equity Rule of the U. S. Courts;

\* SECTION X. — *Prayer for Relief*.<sup>1</sup>

\* 1885

## 38.

And that an account may be taken by and under the direction and decree of this honorable Court, &c., &c. And that the defendant may be decreed to pay unto your orator [*or the plaintiff*], &c., &c. And that your orator [*or the plaintiff*] may have such further or other relief in the premises as the nature of the circumstances of this case may require, and to your honor shall seem meet.<sup>2</sup>

*A more extended form.*

*Prayer for answer, oath waived — injunction against proceeding at Law — declaration of trust — conveyance:* "To the end, therefore, that the plaintiffs may have that relief which they can only obtain in a Court of Equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by the plaintiffs, and that the said defendants, who are plaintiffs as aforesaid in the said action at Law, may be perpetually enjoined from further prosecuting the same, and that it may be declared that the said lands are charged with a trust in favor of, and ought to be held for, the use and benefit of, &c., and that the said defendants, or so many and such of them as shall appear to have the legal title to said lands, may be decreed to convey such legal title, free of all incumbrances done or suffered by them, or any or either of them unto the plaintiffs, in their said capacity, to hold to them and their, &c., upon the trusts aforesaid, and for such further or other relief as the nature of this case may require, and to your honors seem meet."<sup>3</sup>

## 39.

*Prayer to restrain proceedings at Law, and for an injunction.*] And that the said C. D., &c., their counsellors, attorneys, solicitors, officers, or agents may be restrained by an injunction issuing out of this Court, from proceeding further against your orator [*or the plaintiff*] in the said action commenced against him in the, &c., Court of, &c., and now pending and at issue therein, for the recovery of, &c. And that your

Story Eq. Pl. § 847, note. By Equity Rule 41, United States Courts, "The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively, 1, 2, 3, &c.; and the interrogatories which each defendant is required to answer, shall be specified in a note at the foot of the bill, in the form and to the effect following; that is to say, The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3," &c. See *ante*, Vol. I. pp. 376, 377, in note.

<sup>1</sup> See the 21st Equity Rule of the U. S. Courts, *post*, p. 2380. In New Hampshire, the

bill may conclude, "and thereupon the plaintiff prays," setting forth the special relief to which he supposes himself entitled, "and for such other relief as may be just." If an injunction or other special order, pending the suit, is required, it may be specially asked for. Rule 3d of Chancery Rules.

In England, the bill concludes with a prayer, specifically for the relief which the plaintiff may conceive himself entitled to, and also for general relief. *Ante*, p. 377 *et seq.*

<sup>2</sup> Story Eq. Pl. § 40, note.

<sup>3</sup> Earle v. Wood, 8 Cush. 420.

orator [*or the plaintiff*] may have, &c. [*Prayer for general relief.*] \* May it please your honor to grant unto your orator [*or the plaintiff*] a writ of injunction, issuing out of and under the seal of this honorable Court, to be directed to the said C. D., &c., &c., commanding them and each of them absolutely to desist and refrain from proceeding further against your orator [*or the plaintiff*] in said action.

## 40.

*Prayer for a ne exeat.*] And that the said defendants may be stayed by a writ of *ne exeat regno* from departing out of the jurisdiction of this Court. And your orator [*or the plaintiff*], &c. [*Prayer for general relief.*] May it please your honors to grant unto your orator [*or the plaintiff*] a writ of *ne exeat regno*, staying the said C. D. and E. F., or either of them, from departing into parts beyond this State, and out of the jurisdiction of this Court, without leave first had.

Or, thus: [*Modern English Form.*]

*Charges and prayer in a bill to obtain a writ of ne exeat.*] The defendant, C. D., is a natural-born British subject, but he is possessed of large estate in the Island of St. Croix, and is permanently settled, and has his fixed place of abode in the said Island, which is out of the jurisdiction of this Court.

That the defendant is now, and has for some time been on a visit to this country, and is staying at, &c.; but he means and intends very shortly to leave England, and to return to his residence in the said Island of St. Croix, in which case the plaintiffs charge, that they will be without remedy in the premises [*or in danger of losing their debt or claim*] and altogether deprived and defrauded of the money so justly due and owing to them as aforesaid.

The plaintiffs therefore submit that the said defendant ought to be restrained from quitting this kingdom, and that her Majesty's writ of *ne exeat regno* ought to issue for that purpose.

*Prayer.*

[*After the former part of the prayer.*]

That in the mean time the defendant — may be restrained by her Majesty's writ of *ne exeat regno*, issuing out of and under the seal of this honorable Court, from leaving the kingdom [*or from going to any part beyond the seas, or to Scotland, without the leave of this honorable Court*], and that the said writ may be marked with the sum of \$ —, as a direction for the sheriff to take bail therein.

## 41.

*Prayer for an account of rents and profits of mortgaged premises, and sums received by mortgagee in possession.*] And that an account may be



taken of the rents and profits of the said mortgaged premises, \* which have been received by the said defendant, since his \* 1887 possession thereof as aforesaid, or which, but for his wilful default or neglect, might have been so received; and also an account of all other the sums, which have been received by the said defendant in or towards satisfaction of the said mortgage money.

## 42.

*Prayer for the production of Deeds, Papers, &c.*] And that the said defendants may set forth a list or schedule, and description of every deed, book, account, letter, paper, or writing relating to the matters aforesaid, or either of them; or wherein or whereupon there is any note, memorandum, or writing, relating in any manner thereto, which now are, or ever were, in their or either, and which, of their possession or power, and may deposit the same in the office of the clerk [*or in the hands of one of the masters*] of this honorable Court, for the usual purposes; and otherwise that the said defendants may account for such as are not in their possession or power.

SECTION XI. — *Conclusions.*

## 43.

*Prayer for subpœna.*<sup>1</sup>] May it please your honors to grant unto the plaintiff [*or your orator*] a writ of subpœna, to be directed to the said C. D.,<sup>2</sup> &c., thereby commanding them and each of them, at a certain time, and under a certain penalty therein to be limited, personally to appear before this honorable Court [*or your honors in this honorable Court*], and then and there full, true, direct, and perfect answer make to all and singular the premises, *and further to stand to, perform, and abide such further order, direction, and decree therein as to this honorable Court [*or, to your honors*] shall seem meet [*or as shall seem agreeable to Equity and good conscience.*]<sup>3</sup>*

## 44.

*Prayer for Process where the Government is a defendant.*] And may it please your honors, that the District Attorney of the United States for the District of ——— [*or the Attorney-General of the State* \* of ———], on being attended with a copy of this bill, may \* 1888 appear and put in an answer thereto, and may stand to and abide

<sup>1</sup> By 3d of the Chancery Rules in New Hampshire, the prayer for process, unless some special process or order shall be required, may be omitted. In England, the bill contains no prayer for process. All that is required is, that the names of the defendants should be set forth, and a note appended with the names of the solicitors for the plaintiff. *Ante*, Vol. I. p. 389 *et seq.*, and notes.

<sup>2</sup> See 23d Equity Rule of United States Courts, *post*, p. 2380.

<sup>3</sup> The part in italics must be omitted in bills merely for *discovery*, or to *perpetuate the testimony of witnesses*. Story Eq. Pl. § 44, note; Barton's Suit in Eq. 43, note (1); Equity Drafts, 6.

such order, direction, and decree in the said premises as to your honors shall seem meet.

## 45.

*Prayer for injunction and for subpœna.*] May it please your honors to grant unto the plaintiff [*or your orator*] not only a writ of injunction, issuing out of, and under the seal of this honorable Court, to be directed unto the said C. D., &c., &c., to restrain them, their servants, workmen, and agents, from committing waste, &c., but also a writ of subpœna, &c. [*As in No. 38.*]

## 46.

*Prayer for ne exeat and subpœna.*] May it please your honors, the premises considered, to grant unto the plaintiff [*or your orator*] not only a writ of *ne exeat regno*, issuing out of and under the seal of this honorable Court, to restrain the said defendant, C. D., from departing out of the jurisdiction of this Court, but also a writ of subpœna, &c. [*As in No. 38.*]

ORIGINAL BILLS PRAYING RELIEF.

SECTION I.

*Bills for Specific Performance of Agreements.*<sup>1</sup>

1. *Bill by a vendor against a vendee for the specific performance of a written agreement for the purchase of real estate, the title only being in dispute.*

To, &c. [Address.]

HUMBLY complaining, sheweth unto your honors the plaintiff, J. C., of, &c., that he being seised or well entitled in fee-simple of and to a certain messuage or dwelling-house with the appurtenances situate at —, and hereinafter described, and being desirous of selling such premises, and D. E., of, &c., being minded to purchase the same, the plaintiff and the said D. E., on or about the — day of —, entered into and signed a memorandum of agreement respecting the said sale and purchase in the words and to the purport and effect following, that is to say [*stating the agreement verbatim*], as by the said memorandum of agreement, to which the plaintiff craves leave to refer, when produced, will appear. And the plaintiff further shows<sup>2</sup> that the said D. E. paid to him the sum of \$1500, part of the said purchase-money at the time of signing the said agreement. And the plaintiff has \*always\* 1890

<sup>1</sup> The granting of a specific performance of a contract for the sale of land, is not a matter of right to which the party is entitled when he has proved his contract, but is always a matter of sound and reasonable discretion on the part of the Court, in view of all the circumstances of the case. *Lamare v. Dixon*, L. R. 6 H. L. 414; *Eastman v. Plumer*, 46 N. H. 464. In exercising this sound discretion, the Court will not decree a specific performance in cases of fraud or mistake, or of a hard and unreasonable bargain, or in case of great inadequacy or exorbitancy of price, or where the decree would in any way produce injustice. *Eastman v. Plumer*, *supra*, and the cases there cited and other points therein made. See the same case also in reference to the effect of delay in claiming specific performance.

See, as to the Court refusing to enforce an unconscionable bargain, *Miss. & Mo. R. Co. v. Cromwell*, 91 U. S. 643; *Iglehart v. Vail*, 73 Ill. 63; *Thurston v. Arnold*, 53 Iowa, 41; *Snell v. Mitchell*, 65 Me. 48; *Wistar's Appeal*, 80

Penn. St. 484. So where performance is impossible. *Peck v. Gaither*, 73 N. C. 95.

There are many equitable circumstances not amounting to illegality or actual fraud in the contract, which may properly induce a Court of Equity to refuse to decree a specific performance of the contract, and to leave the party to his remedy at Law for a non-performance, which would not be sufficient to warrant the Court in setting aside the contract of sale. *Eastman v. Plumer*, *supra*.

As to damages in such suits, see *Lehmann v. McArthur*, L. R. 3 Eq. 746; *Lewers v. Earl of Shaftesbury*, 16 L. T. N. S. 135. For form of prayer, see *Loames v. Edge*, Johns. 671.

<sup>2</sup> By the 7th Chancery Rule in New Hampshire, it is provided that "the idle repetitions," "your orator further complains," "your orator further sheweth to your honors and the like in bills," "shall be omitted, and when the names of parties are omitted, they shall be referred to as plaintiffs or defendants."

been ready and willing to perform his part of the said agreement, and on being paid the remainder of his said purchase-money with interest, to convey the said message to the said D. E., and his heirs, and to let him into the receipt of the rents and profits thereof, from the time in the said agreement in that behalf mentioned; and the plaintiff hoped that the said D. E. would have performed the said agreement on his part as in justice and equity he ought to have done. But now so it is, may it please your honors, that the said D. E. alleges, that he is, and always has been, ready and willing to perform the said agreement on his part in case the plaintiff could have made, or can make a good and marketable title to the said message and premises, but that the plaintiff is not able to make a good title thereto; whereas the plaintiff charges that he can make a good title to the said message and premises. To the *end* therefore that the said D. E. may true answer make to the premises aforesaid, and more particularly that he may answer and set forth in manner aforesaid, whether, &c. [*Interrogating to the stating and charging parts.*] And that the said D. E. may be compelled by the decree of this honorable Court specifically to perform the said agreement with the plaintiff, and to pay to him the remainder of the said purchase-money with interest for the same from the time said purchase-money ought to have been paid, the plaintiff being willing, and hereby offering specifically to perform the said agreement on his part, and on being paid the said remaining purchase-money and interest to execute a proper conveyance of said message and premises to the said D. E., and to let him into possession of the rents and profits thereof from the said — day of —. And that the plaintiff may have such further and other relief in the premises as to your honors shall seem meet and this case may require; may it please your honors, &c. [*Prayer for subpoena, as in form 43, ante, p. 1887.*]

2. *Modern English form of bill for specific performance of agreement for purchase of an estate.*

*Title and Address.*

Humbly complaining, &c., A. B., of, &c., the above-named plaintiff, as follows: —

1. In and previously to the month of June, 1851, the plaintiff was absolutely entitled to a certain estate called, &c., situate at, &c., in the county of —.

2. On the — day of June, 1851, the defendant agreed to purchase the said estate; and a memorandum of such agreement was reduced into writing, and duly signed by the defendant. Such memorandum was in the words and figures, or to the purport and effect following [*Memorandum set out.*]

\* 1891 3. \* The plaintiff has frequently applied to the defendant, and requested him to perform the said agreement, but he has refused or neglected to do so.

*Prayer.*

The plaintiff prays as follows :—

1. That the defendant may be decreed specifically to perform the said agreement of the — day of June, 1851; the plaintiff hereby offering specifically to perform the said agreement upon his part: and that for the purposes aforesaid all proper directions may be given, and inquiries made.

2. That the plaintiff may have such further or other relief as the nature of the case may require.

3. CHARGE. *In a bill by a purchaser against the vendor for the specific performance of a contract for sale of a freehold estate*, the plaintiff charges that a part of the purchase-money has remained unproductive in his hands.

And the plaintiff further sheweth, that previously to the signing of the said agreement, the plaintiff paid unto the said S. B. the sum of \$500, as a deposit and in part of his said purchase-money or sum of \$2900; and the said S. B. has since delivered up possession of the said purchased premises to the plaintiff. And the plaintiff further sheweth unto your honors, that he has always been ready and willing to perform his part of the said agreement, and, on having a good and marketable title shown to the said estate and premises, and a conveyance of the fee-simple thereof discharged of all incumbrances made to him, to pay the residue of the said purchase-money or sum of \$2900, to the said S. B. And the plaintiff hoped that the said S. B. would have specifically performed his part of said agreement as in justice and equity he ought. *But now so it is, &c.* [See No. 34, p. 1882], the said S. B. refuses to perform his part of the said agreement, and to color such refusal, he gives out and pretends that he is unable to make out a good and marketable title to the said estate and premises, and that he is willing to cancel the said contract or agreement, and to repay the said deposit or sum of \$500 to your orator. Whereas the plaintiff charges that the said S. B. is able to make out a good and marketable title to the said estate and premises, if he thinks proper to do so, but that the said S. B. refuses and declines to make out a good and marketable title to the said premises, notwithstanding the plaintiff has required him so to do, and offered to pay him the residue of the purchase-money upon having the title made out and a proper conveyance of the said premises executed to the plaintiff, his heirs and assigns, by the said S. B. And the plaintiff charges that the whole of \*1892 the residue \* of the purchase-money of the premises has been ready and unproductive in his hands for completing the said purchase from the time it ought to have been completed by the terms of the said agreement. All which actings, &c. [See form No. 36, p. 1883.]

4. CHARGE. *In a bill by first vendee, for a specific performance of an agreement for the purchase of an estate, against a vendor, and a subsequent purchaser from him, the plaintiff charges the subsequent purchaser with notice, and also charges the vendor with acts of waste, and prays for an injunction against both defendants to restrain waste.*

And the plaintiff charges that the said G. K. has since contracted for the sale of the said premises to the said T. P., at an advanced price, and has actually conveyed the said premises or entered into an agreement to convey the same to the said T. P., or to some other person or persons by his order, or to his use, or in trust for him. And the plaintiff charges that the said T. P., at the time he entered into the said contract for the purchase of the said premises, or at the time of the conveyance thereof to him, if the same have been conveyed to him, or at the time of the payment of the purchase-money for the same, if he has actually paid such purchase-money, well knew or had been informed, or had received some intimation, or had some reason to believe or suspect that the said G. K. had entered into such agreement as aforesaid with the said A. B., or into some agreement with the plaintiff, or with some person on his behalf for the sale of said premises to the plaintiff. And the said T. P., or the agent employed by him in the said purchase or contract, had at some or one of the times aforesaid some knowledge or intimation of the several circumstances aforesaid respecting the said premises, which had passed between the plaintiff, and the said G. K., or their solicitors. And the plaintiff charges that the said J. F. was in fact the agent employed in the contract or sale by the said G. K. to the said T. P., as well on the part of the said G. K. as of the said T. P. And the plaintiff further charges that, if, in fact, the said T. P. has paid the purchase-money for the said premises or any part thereof, to the said G. K., the said T. P. has had or taken some indemnity from the said G. K., or some other person in respect of such payment or of such purchase. And the plaintiff further charges that after he, by the said A. B., had entered into such agreement with the said G. K. as aforesaid, and after the hay season of this year, he verbally agreed with the said G. K. that the hay on the farm should be left by the said G. K. and taken by the plaintiff at an appraisement, but the said G. K. has nevertheless sold and removed the said hay from the farm, to the  
 \* 1893 great injury thereof, and the said G. K. has, \*since his said agreement with the said A. B., ploughed up more than sixty acres of land, which according to the usual course of husbandry ought to have been laid down with grass. And the said G. K. has also cut down many timber and other trees upon the said premises, and has committed and done other waste and injury thereto. And the said G. K., and also the said T. P., threaten and intend to cut down other trees on and from the said premises, and to commit other waste and injury thereto. All which actings, &c. [*See forms Nos. 36 and 37, pp. 1883, 1884, interrogating to the stating and charging parts*],

and that the said defendants may answer the premises; and that the said defendant, G. K., may specifically perform the said agreement so made and entered into by him as aforesaid with the said A. B. as the agent of the plaintiff, the plaintiff being ready and willing, and hereby offering specifically to perform the said agreement in all things, on his part and behalf. And that the said G. K. may be decreed to make compensation to the plaintiff for the waste and other damage done by him to the said premises since the making of the said agreement. And that in the mean time the said defendants, G. K. and T. P., may be restrained by the order and injunction of this honorable Court from cutting down any timber or other trees upon the said premises, or from committing any other waste thereon. [*And for farther relief, &c.*] May it please, &c. [*Pray subpoena and injunction against G. K. and T. P. See forms Nos. 43 and 45, pp. 1887, 1888.*]

5. *Bill by lessee against lessor for specific performance of a written agreement for a lease of a house.*

Humbly complaining, sheweth unto your honors the plaintiff A. B., of, &c.; that C. D., of, &c. (the defendant hereinafter named), being or pretending to be seised or possessed of a messuage or tenement situate, &c., and being willing and desirous to let the same, he in the month of, &c., proposed and agreed to grant unto the plaintiff a lease of the aforesaid premises with the appurtenances, and thereupon the plaintiff and the said C. D. duly executed or subscribed a certain memorandum or agreement, bearing date, &c. [*stating the agreement*], as in and by, &c. And the plaintiff further sheweth that in expectation and full confidence that a lease would have been made and executed to him of the said messuage or tenement and premises, pursuant to the terms of the said agreement, the plaintiff has laid out sundry sums in repairs on the said premises to a considerable amount. And the plaintiff further sheweth that he has been always ready to perform his part of the said agreement, and to accept a lease of the said premises pursuant to the terms thereof. And the plaintiff for that purpose caused a draft of a lease to be drawn pursuant to the terms of the aforesaid agreement,

\* and tendered the same to the said defendant for his perusal and \* 1894 approbation, but he refused to accept or peruse the same. And the plaintiff further sheweth that he has frequently by himself and his agents applied to the said C. D., and in a friendly manner requested him to make and execute unto the plaintiff a lease of the said messuage or tenement and premises conformably to the said agreement. And the plaintiff well hoped, &c. *But now so it is* [*See form No. 34, p. 1882*], defendant pretends that no such agreement as aforesaid was ever made or entered into by or between the said defendant and the plaintiff, or any agreement, or that he consented to grant a lease to the plaintiff of the aforesaid messuage or tenement and premises. Whereas the plaintiff charges the contrary of said pretences to be the truth, and so the said confederate will at other times admit; but then he pretends

that he has been always ready and willing to make and execute a lease of the said messuage or tenement and premises, pursuant to the terms of the said agreement, and in all respects to perform the same on his part. Whereas the plaintiff charges the contrary thereof to be the truth. But nevertheless the said defendant refuses to comply with the plaintiff's aforesaid requests to perform or fulfil the aforesaid agreement. All which actings, &c. [*See form No. 36, p. 1883.*] And that the said agreement may be specifically performed and carried into execution, and that the said defendant may be decreed to execute a lease of the aforesaid messuage or tenement and premises to the plaintiff according to the terms of the aforesaid agreement, the plaintiff hereby offering to execute a counterpart thereof, and in all other respects to perform his part of the said agreement [*and for further relief see form No. 38, p. 1885.*] May it please your, &c. [*Pray subpoena against C. D.*]

6. *Bill for specific performance of an agreement to convey real estate, against an administrator and minor children.*

To the Honorable, &c.

A. B., of, &c., humbly complaining, sheweth that C. D., of, &c., &c., being seised and possessed of a certain parcel of real estate, situate, &c. (*give the description and boundaries*), entered into a written agreement with the plaintiff for the purchase and sale thereof, as follows, viz. (*state the agreement*) [*or a copy of which agreement is hereto annexed*], as by the said agreement, which the plaintiff has here in Court ready to be produced, and to which he craves leave to refer, will appear [*or as by said agreement hereto annexed will appear*]. And the plaintiff further shows that, pursuant to the said agreement, he has paid the taxes on the said premises for the year, &c., amounting to the sum of \$——. And the plaintiff further shows, that, since the making of the said agreement, to wit, on the, &c., the said C. D. died intestate, \*1895 \*and that, during his lifetime he never made any conveyance of the said premises to the plaintiff, that the said C. D. left a widow, M. A. D., and four children, viz., M. D., L. D., M. A. D., and J. D., all of whom are minors under the age of twenty-one years, and the sole heirs of the said C. D. That S. K., of, &c., Esq., has been duly appointed administrator of the goods and estate, which were of the said C. D.; but no person, as yet, has been appointed guardian of the said minor children. And the plaintiff further shows that he is desirous of obtaining a conveyance of the said real estate, pursuant to the terms of said agreement between the plaintiff and the said C. D., deceased, and is willing and ready to pay therefor the price stipulated in the said agreement in cash, or to give his note of hand, secured by mortgage of the premises, as is provided in the said agreement, and further that he is willing to waive any claim which he has upon the heirs of the said C. D., or upon his administrator, to advance the sum of \$——, upon the erection by him of two dwelling-houses



on the said real estate, as the said C. D. agreed that he would do. And the plaintiff further shows that he has made application to the said M. A. D., the widow of the said C. D., and ascertained that she is willing to release to the plaintiff her dower in the premises, upon having the interest of one-third part of the purchase-money secured to and paid to her during the period of her natural life, or having paid to her an amount equal to the present value of her said life-interest. But by reason that the said C. D. died intestate, there is no person who has legal authority to execute a deed, whereby to convey to the plaintiff the fee of the said real estate, of which the said C. D. died seised. In consideration whereof, &c. *To the end, therefore*, that the said S. K., the said M. D., the said L. D., M. A. D., and J. D. may, upon their several and respective oaths, &c., &c. [*See form of interrogating part, ante, No. 37, p. 1884*], and that the said S. K., and the said M. D., L. D., M. A. D., and J. D., may be decreed specifically to perform the said agreement entered into by the said C. D. with the plaintiff, the plaintiff being ready and willing and hereby offering specifically to perform the said agreement on his part, and that the plaintiff may have such other and further relief, &c., &c. (*Prayer for a subpoena.*)

7. *Allegations and prayer in a bill for specific performance of a parol agreement, the plaintiff relying upon part-performance, according to the modern English form.*

(*The bill stated the lease under which the plaintiff claimed, and negotiations for purchase by the defendant.*)

On the — day of — it was agreed by and between the plaintiff and defendant, that the defendant should give the plaintiff \$ — for the purchase of the plaintiff's term and interest in the said leasehold\* premises under the said lease, he, the defendant, taking \*1896 the plaintiff's title, such as it was, and the plaintiff consenting to do certain works to the premises, which the defendant then specified (that is to say), &c.

(*Subsequent correspondence and statement of the works required by the defendant to be performed to the premises.*)

The plaintiff, in pursuance of the said agreement so entered into between the plaintiff and defendant as aforesaid, performed all the works so agreed to be performed by him to the premises; and the plaintiff, in pursuance of the said agreement, and in full faith and reliance that it would be performed on the part of the defendant, permitted the defendant to enter into, and he did accordingly on, &c., enter into and remain in possession of the said premises.

The defendant, however, now refuses to perform the said agreement on his part, and he alleges that no contract has been entered into by or between the plaintiff and defendant for purchasing the said premises for the term and interest of the plaintiff therein, under and by virtue of the said indenture of lease: whereas the plaintiff charges the contrary thereof to be truth.

The defendant, at other times, alleges that he has not accepted the title of the plaintiff as shown by said indenture of lease; whereas the plaintiff charges that the defendant has accepted the plaintiff's title to the premises, and has so admitted to the plaintiff and to other persons.

[*Charge as to documents.*]

*Prayer.*

The plaintiff may pray as follows:—

1. That the agreement so made or entered into by or between the plaintiff and defendant for the purchase of the term and interest of the plaintiff in the said leasehold messuage and premises may be specifically performed by the defendant, the plaintiff being willing to perform the same so far as it remains on his part to be performed.

2. That proper directions may be given for settling an assignment of the said premises to the defendant for the remainder of the plaintiff's term therein, with a proper covenant therein to indemnify the plaintiff against the payment of the rent and observance of the covenants respectively reserved and contained in the said indenture of lease; and that the defendant may be decreed to execute such assignment or a counterpart thereof, and that upon the execution of the assignment by the plaintiff, the defendant may be decreed to pay the said purchase-money of \$—— to the plaintiff, together with interest at the rate of \$—— per centum per annum from, &c., together with the costs of this suit.<sup>1</sup>

3. [*For further relief, &c.*]

\* 1897 \* 8. *Prayer of a bill of a surety to compel a specific performance of an agreement to execute a mortgage to indemnify the plaintiff from all liability; praying also for a writ of ne exeat regno.*

And that the defendant may be decreed specifically to perform the said agreement, and to make a mortgage to the plaintiff of the said estate and premises to indemnify him against the obligation he has entered into in the Admiralty Court as hereinbefore mentioned. And that it may be referred to a master to settle such conveyance if the parties should differ about the same. And that the defendant may be restrained from going out of the jurisdiction of this honorable Court, into parts beyond the seas or into ——, and that for that purpose a writ of *ne exeat regno* may be issued out of and under the seal of this honorable Court to restrain the defendant from going out of the State [*or Commonwealth*] of, &c., [*or into parts beyond the seas, or out of the jurisdiction of this honorable Court.*] [*General relief.*]

<sup>1</sup> In a bill, as well as claim, by a vendor against a purchaser for a specific performance of an agreement, if the plaintiff relies upon an acceptance of title by the defendant, as a ground for dispensing with the usual inquiry as to title, there must be a specific charge to

that effect, although the facts and circumstances stated in the bill should warrant the conclusion that the title has been accepted. *Clive v. Beaumont*, 1 De G. & S. 397; *Gaston v. Frankum*, 2 De G. & S. 561.

9. *A bill to enforce the specific performance of a contract to make a policy of insurance.*<sup>1</sup>

To the Judges of the Circuit Court of the United States, for the District of Massachusetts.

The Union Mutual Insurance Company, a corporation duly established by the laws of the State of New York, doing business at the city of New York, in the State of New York, bring this their bill of complaint against the Commercial Mutual Marine Insurance Company, a corporation duly established by the laws of the Commonwealth of Massachusetts, doing business at the city of Boston in said Commonwealth.

And thereupon your orators complain and say, that in and by their charter and by the laws of the State of New York, they were, on the second day of November, eighteen hundred and fifty-three, and ever since have been, authorized and empowered to make insurance, among other things, against loss by the perils of the seas and against loss by fire; that your orators on the said second day of November, underwrote and caused one D. McKay to be insured for whom it might concern, payable in the event of loss to the said McKay, on one-eighth of the good ship Great Republic, the said ship having been valued at one hundred and seventy-five thousand dollars, the sum of twenty-two thousand dollars, for the term of one year at and from the second day of November, eighteen hundred and fifty-three, at noon, until the second day of November eighteen hundred and fifty-four, at noon, against loss \* from sundry designated risks, and especially from \* 1898 loss from the perils of the seas and from loss by fire, as will more fully appear from a copy hereunto annexed and made a part of this bill, of the policy issued by your orators to the said D. McKay.

Your orators further say, that thereafter the aforesaid insurance so made by your orators upon the Great Republic, and on the night of the twenty-sixth of December, eighteen hundred and fifty-three, the said ship was totally destroyed and lost by fire, one of the perils insured against; that your orators thereupon became liable to pay, and thereafter such loss did pay, to the said D. McKay the full sum of twenty-two thousand dollars, the amount so as aforesaid by your orators underwritten.

Your orators further say that after they had insured the said McKay, as aforesaid, and before the loss aforesaid of the said ship, and before the commencement of the fire by which its destruction was produced, your orators requested and authorized Charles W. Storey, of Boston aforesaid, insurance broker, to cause and procure your orators to be reinsured in the sum of ten thousand dollars upon the said Great Republic, for the term of six months, against all and singular the risks by your orators theretofore assumed, and especially against loss from the perils of the seas and from fire.

Your orators further say, that the said Charles W. Storey, as the agent of your orators, in that behalf duly authorized and in their name

<sup>1</sup> Union Mut. Ins. Co. v. Commercial Mut. Mar. Ins. Co., 2 Curtis, 524.

and behalf, on Saturday, the twenty-fourth day of December, eighteen hundred and fifty-three, made application to the said defendants for the reinsurance by them of your orators upon the said Great Republic, in and for the sum of ten thousand dollars, for the term of six months from the twenty-fourth day of December aforesaid, against such risks as your orators had assumed, and especially against loss from the perils of the seas and against loss from fire; that the said application so made by the said Storey was made at the office and usual place of business of the said Commercial Mutual Marine Insurance Company in Boston; that it was so made in the first instance to the secretary of the defendants, and immediately thereafter, and on the day last aforesaid, to George H. Folger, the president of the defendants, who was duly authorized to receive and act thereupon for the defendants.

Your orators further say, that upon the making of the said application, the said George H. Folger, after consulting and advising with some person then present, whose name is to your orators unknown, replied to the said Storey that the defendants would reinsure your orators, in the sum of ten thousand dollars, upon the said Great Republic, and would assume the risks proposed for the term of one year, at and for a premium of six per cent upon the sum to be underwritten; that they would insure against the said risks for the term of six months at and for a premium of three and one-half of one per cent upon the sum to be insured.

\* 1899      \* Your orators further say, that the said Storey, immediately thereafter the said application, communicated to your orators the terms upon which the said defendants would reinsure your orators upon the said great Republic.

Your orators further say, that on the said twenty-fourth day of December, your orators upon being advised by the said Storey as aforesaid, directed, authorized, and requested the said Storey, in the name and behalf of your orators, to accept the terms aforesaid, for six months, and to procure for your orators a reinsurance, in accordance therewith, from the twenty-fourth of December aforesaid.

Your orators further say, that the said Storey as agent, and in behalf of your orators, on Monday, the twenty-sixth day of the said December, at or about eleven o'clock before noon, at the place of business of the said defendants in Boston, and before any loss or damage had occurred to the said Great Republic, notified the said Folger that your orators had accepted the proposition of the defendants to reinsure your orators for the term of six months from the twenty-fourth of December aforesaid, at noon.

Your orators further say, that on the said twenty-sixth day of December, and before any loss or damage had occurred to said ship, the above-named Storey, in behalf of your orators, embodied in a paper partly printed and partly written, the terms of the contract of reinsurance, so as aforesaid, on the said twenty-fourth of December, in answer to the aforesaid application, proposed to your orators by the said defendants, and so as aforesaid accepted on the morning of the twenty-sixth of December.

Your orators further say, that the said paper was examined, approved, and retained by the said Folger, he in this behalf acting for the defendants, and by him was, in the name of the defendants, assented to, and thereupon a contract of reinsurance by and between the defendants and your orators was complete and concluded, upon the terms in said paper contained, by force whereof the defendants became and were liable and agreed to and with your orators to pay to them the sum of ten thousand dollars, in the event that the said ship Great Republic should be lost or damaged within six months from and after noon of the said twenty-fourth of December, by the perils of the seas or by fire.

Your orators further say, that the said Folger, in behalf of the defendants, and in their name and behalf, agreed with the said Storey, he acting for your orators, that a policy should be prepared and executed by the said defendants to your orators, at the early convenience of the defendants, and delivered to your orators, containing with other usual and accustomed clauses, the terms of the contract of reinsurance, so as aforesaid concluded by and between your orators and the defendants, and so as aforesaid embodied and set forth in the paper aforesaid.

\* Your orators further say, that the said Storey, on the twenty- \* 1900 sixth day of December aforesaid, was authorized, ready, and willing in behalf of your orators to pay to the defendants, or secure to their satisfaction, at their election, the premium, so as aforesaid agreed upon, on the said reinsurance, but the same was not then paid, because the defendants were accustomed not to receive the premiums by them required in their contracts of insurance until the preparation and delivery of the policies by them agreed to be issued.

Your orators further say, that the said Storey, on the said twenty-sixth day of December, immediately upon the conclusion of the aforesaid contract of reinsurance, advised your orators of its completion.

Your orators further say, that the said Storey, on Tuesday, the twenty-seventh day of December aforesaid, notified the defendants that the said ship had been destroyed by fire and was totally lost, and at the same time asked Edmund R. Whitney, secretary at the time of the defendants, in the presence and hearing of the said Folger, at the office of the said defendants, if the policy had been prepared for your orators, to which the said Whitney, in the hearing of the said Folger, said no, assigning no reason for the delay, or intimating any refusal to execute such policy.

Your orators further say, that the said Storey, on Wednesday the twenty-eighth of December, called a second time at the office of the defendants and asked for the said policy, to which the said Folger replied, he was in doubt whether the contract was complete and obligatory, as it was made on a day regarded as Christmas-day, but he, the said Folger, had not made up his mind about it, and did not want to talk on the subject then.

Your orators further say, that one F. S. Lothrop, on the thirtieth of January, eighteen hundred and fifty-four, in behalf of your orators, made a draft upon the defendants for the sum of nine thousand six hundred and fifty dollars, the amount of said reinsurance, less the pre-

mium, payable at sight, to John S. Tappan, your orators' vice-president, which draft was thereafter, on the first day of February, eighteen hundred and fifty-four, presented to the defendants, which they refused to pay or accept.

Your orators further say, that the said Storey, in behalf and in the name of your orators, in that behalf duly authorized, on the twenty-sixth day of April, eighteen hundred and fifty-four, at the office of the defendants, made demand upon the aforesaid Folger, for the execution and delivery of the policy so as aforesaid by the said defendants theretofore agreed to be by them executed and to your orators to be delivered, and at the same time tendered to the said defendants the sum of three hundred and sixty dollars as and for premium, interest, and cost of policy, with which request the said Folger, in the name of the said defendants and in their behalf, refused to comply.

\* 1901 \* Your orators further say, that they have applied to the defendants for a copy of the aforesaid paper so left with them on the twenty-sixth of December, which they refused to furnish.

And your orators well hoped that the defendants would have complied with the reasonable requests of your orators.

To the end, therefore, that the said defendants may, if they can, show your orators should not have the relief hereby prayed, and may, according to the best and utmost of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogations hereinafter numbered and set forth as by the note hereunder written they are required to answer, that is to say, —

1. Whether, upon your information and belief, &c.
  2. Whether, &c.
  3. Whether, &c.
- &c., &c.

And your orators pray that the defendants may discover and produce the original paper or memorandum, so as aforesaid made by said Storey, and dated twenty-fourth of December, eighteen hundred and fifty-three, which was so as aforesaid left with their president at their place of business on the aforesaid twenty-sixth of December.

And that the said agreement of the defendants to execute and deliver to your orators a policy of reinsurance, according to the terms of the aforesaid paper, and in accordance with the defendants' contract of insurance as aforesaid, may be specifically performed, your orators hereby undertaking to perform their undertakings in the premises.

And that the said defendants may be decreed to pay to your orators the sum of ten thousand dollars, the sum so as aforesaid by them reinsured to your orators, with interest thereon. And that your orators shall have such other and further relief as the case may require and as shall seem meet to the Court, and as shall be agreeable to equity and good conscience.

And your orators pray this honorable Court to issue a writ of *subpoena* in due form of law according to the rules of this Court, to be directed to the Commercial Mutual Marine Insurance Company, a corporation

by the law of Massachusetts, at Boston, commanding them on a certain day and under a certain penalty to be and appear before this honorable Court, and to stand to, abide, and perform such order and decree therein as to this Court shall seem meet, and as shall be agreeable to equity and good conscience.

The Union Mutual Insurance Company of New York,  
by C. B. G., *their attorney.*

C. B. G., *counsel.*

\* 10. *A comprehensive form of a bill by a person entitled to the specific performance of a contract for the sale or purchase of real or personal estate seeking such specific performance.*<sup>1</sup> \* 1902

### SUPREME JUDICIAL COURT.

Essex, ss.

In Equity.

JOHN LEE . . . . . Plaintiff.

HENRY JONES . . . . . Defendant.

### *Bill of Complaint.*

To the Honorable, &c.

John Lee, of Lynn, in said county of Essex, merchant, the above-named plaintiff, brings this his bill of complaint against Henry Jones, of Salem, in said county, Esquire, the above-named defendant, and thereupon complains and shows as follows:—

1. That the said Henry Jones, by an agreement in writing, dated on the — day of —, by him subscribed [*or signed*], a copy of which is annexed to this bill, marked —, agreed to purchase of the said John Lee, the plaintiff [*or sell to him*], a certain farm [*or messuage, or parcel of real estate*] situate in —, and bounded and described as follows: [*here give the description and boundaries*] [*or one hundred shares in the capital stock of the Eastern Railroad Corporation*], in the said agreement referred to, for the sum of \$—.

2. The plaintiff has always been ready, and has offered and now offers specifically to perform the said agreement on his part.

3. The plaintiff has made or caused to be made an application to the said Henry Jones, specifically to perform the said agreement on his part, but said Jones has not done so.

The plaintiff therefore prays as follows:—

1. That this Court will declare that the plaintiff is entitled to a specific performance and execution of the said agreement, and will decree the same accordingly.

2. That this Court will decree to the plaintiff his costs of this suit.

<sup>1</sup> That a Court of Equity has authority to decree a specific performance of a contract to transfer shares in corporations, see *Todd v. Taft*, 7 Allen, 371; *Leach v. Fobes*, *supra*; *Cheale v. Kenward*, 3 De G. & J. 27; *Clark*

*v. Flint*, 22 Pick. 231. But not where its aid is sought to carry into effect an unconscionable bargain. *Mississippi & Mo. R. Co. v. Cromwell*, 91 U. S. 643.

3. That the plaintiff may have such further and other relief as the nature of his case requires.

4. That for the purposes aforesaid, all proper inquiries may be made, accounts taken, and directions given.

5. That a writ of *subpoena* may issue out of this Court, directed to the said Henry Jones, commanding him to be and appear before this Court [to be holden in and for the county of Essex aforesaid], on a day and under a pain therein specified, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this Court shall seem meet.

\* 1903

## \* SECTION II.

*Bill relating to the Estate of a Married Woman.*

11. *Bill to enforce payment, out of a married woman's separate property, of a bond given by her for the price of land conveyed to her for her sole and separate use.*<sup>1</sup>

To the Honorable the Justices of the Supreme Judicial Court, &c.

Humbly complaining, sheweth unto your honors A. G. R., of the city and State of New York, that C. M. W., of B., in the county of S., and Commonwealth of Massachusetts, married woman, wife of J. W. W., did, as the plaintiff is informed and believes, on or about the — day of —, A. D. 1855, purchase in her own name and in her own right, an estate of land and buildings, situated in the town of J., in the county of Q., and State of N. Y., of one I. H., then of said town of J.; which said estate consisted of several parcels or pieces of land, as will more fully appear by the deed thereof from said I. H. to the said C. M. W.; a certified copy whereof, from the registry where the same is recorded, the plaintiff craves leave to produce at the hearing of this case.

And the plaintiff further shows that he is informed and believes that the consideration or price of said estate, purchased by the said C. M. W. as aforesaid, was not less than eighteen thousand dollars, which the said C. M. W. paid, or agreed to pay; and that, as a part of said price or consideration, the said C. M. W. assumed and agreed to pay a mortgage for six thousand dollars on said estate, made by the said I. H. to M. S. and H. S., dated on or about the — day of —, 1854; and that, further, for a portion of said price, or consideration of said purchase, the said C. M. W., together with her husband, the said J. W. W., made and executed to the said I. H. a bond for the sum of six thousand dollars, under seal (a copy whereof is hereto annexed, marked

<sup>1</sup> Rogers v. Ward, 8 Allen, 387. Where a married woman contracts a debt which she can only satisfy out of her separate estate, her separate estate will, in Equity, be made liable

to the debt. Picard v. Hine, L. R. 5 Ch. 274; see Johnson v. Gallagher, 3 De G. F. & J. 494; Johnson v. Vail, 14 N. J. Eq. 423.



“A”), and that, to secure the payment of said bond, the said C. M. W., together with her said husband, executed and delivered to the said I. H. a mortgage on said estate before mentioned; which said mortgage, or a certified copy thereof, the plaintiff craves leave to produce in Court at the hearing of this cause.

And the plaintiff further shows, that, on or about the — day of —, 1859, he purchased, for a valuable consideration, of the said I. H., the bonds before mentioned, given by the said C. M. W. and her \* said husband to the said I. H., together with the said mortgage \* 1904 given as aforesaid to secure the payment of the same; which were assigned to the plaintiff by the said I. H., by an assignment in writing duly executed, and delivered by the said I. H. to your orator on or about said — day of —, 1859; and the plaintiff became thereby the owner of said bond and mortgage, and the debt and money due from said C. M. W. to the said I. H., and ever since has and still does continue to own and hold the same.

And the plaintiff further shows, that no part of the principal sum, or the interest thereon, of said bond (or of the debt due from the said C. M. W., as aforesaid) has been paid since the same was assigned to him; and he is informed and believes that no part of the principal sum of said bond had been paid before the same was assigned to him; but he is informed that the interest due thereon had been paid up to April, 1857; and there is now due to the plaintiff, as he believes, the whole of the principal sum of six thousand dollars on said bond, and the interest thereon, at the rate of six per cent per annum, from April, 1857, to the present time.

And the plaintiff further shows, that he is informed and believes that the said C. M. W. has not paid said first-mentioned mortgage made by said I. H. to M. S. and H. S., neither the interest nor the principal thereof; but, in consequence of her not paying the same as she had assumed and agreed to do, the holders or holder of said mortgage have foreclosed the same, in the manner and form required by the laws of the State of N. Y.; and, under and in pursuance of such foreclosure, said estate has been sold at sheriff's sale to pay said mortgage; and, as the plaintiff is informed and believes, said estate did not bring at said sale above the sum of seven thousand dollars, which, as the plaintiff is informed and believes, was not enough to pay the amount due on said first-mentioned mortgage.

And the plaintiff further shows, that he is informed and believes that the said C. M. W., together with her said husband, has, since the date of said bond and mortgage given by her to the said I. H., and by him assigned to the plaintiff, sold and conveyed said estate to one W. for a large sum or price, the particulars of which are unknown to your orator.

And the plaintiff further shows, that the said estate was conveyed to the said C. M. W., as her sole and separate property, and that she was possessed of it as such; and that, as the plaintiff is informed, she has other sole and separate property, either in her own name or in the name or in the hands of some person as trustee; and that such property,

either in her own name or in the hands of her trustee, ought to be and is holden for and chargeable with the payment of the amount of said bond, and the interest due thereon; and the plaintiff ought to receive and recover the same from the said C. M. W.'s estate.

\* 1905 \* But now, so it is, may it please your honors, that the said C. M. W. and the said J. W. W., although often requested to pay to the plaintiff the amount due to him upon said bond and mortgage, utterly and wholly refuse and neglect to comply with such request, or to pay to the plaintiff the same, or any portion thereof; all of which is contrary to equity and good conscience, and tends to the manifest injury of the plaintiff.

In consideration whereof, and forasmuch as the plaintiff is entirely remediless in the premises, according to the strict rules of the Common Law, and can only have relief in a Court of Equity, where matters of this nature are properly recognizable and relievable; to the end, therefore, that the said C. M. W., upon her corporal oath, may full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated and she thereunto distinctly interrogated, and that according to the best of her knowledge, information, and belief:—

And that your honors would order and find the amount due to the plaintiff upon said bond and mortgage, and decree that the same may be paid to the plaintiff out of the separate property of the said C. M. W., standing either in her own name, or in the hands of a trustee; and that the plaintiff may have such other and further relief in the premises as the nature of his case shall require, and to your honors shall seem meet:—

May it please your honors to grant unto the plaintiff a writ of *subpoena*, issuing out of this honorable Court, to be directed to the said C. M. W., thereby commanding her, under a certain penalty therein to be specified, to be and appear personally before your honors at a certain day, then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet: and the plaintiff shall ever pray.

A. G. R.

### SECTION III.

#### *Bill relating to Dower.*

#### 12. *Bill for Dower to set aside release made thereof for Fraud and Imposition in the United States Circuit Court.*<sup>1</sup>

Humbly complaining, show unto this Honorable Court, your orator, Ellick P., of Cincinnati, in the State of Ohio, Esq., and a citizen of the said State of Ohio, and your oratrix, Elizabeth P., now the wife of the said Ellick P., of said Cincinnati, and a citizen of the said State

<sup>1</sup> Powell v. Monson &c. Manuf. Co. 3 Mason, 347.

of \* Ohio, gentlewoman, that the said Elizabeth, who was the \* 1906 widow of R. M., late of M., in the said Commonwealth of Massachusetts, deceased, intestate, wherein the said Ellick and Elizabeth demand against the Monson and Brimfield Manufacturing Company, duly and legally incorporated by that name within the said Commonwealth of Massachusetts, the reasonable or just third part whereof the said Elizabeth is by law dowable according to the true intendment of law, of, and in the following described lands or tenements bounded and described as follows, to wit: [*Description and boundaries.*]

Whereupon your said orator and oratrix complain and say that the said R. M., formerly the husband of your said oratrix, was seised in his demesne as of fee of the aforesaid described lands and tenements during the coverture of the said R. M., with her, your said oratrix, and while she was his wife and was actually in possession thereof.

And your said orator and oratrix further say, that they at said M., on the 3d day of March, A. D. 1823, did make demand and require of the said Monson and Brimfield Manufacturing Company, who then did and now do claim a right of freehold and inheritance in the before described premises, to assign and set out to her, your said oratrix, her dower or just third part of and in the aforesaid premises.

And your orator and oratrix further say, that since the time of making said demand as aforesaid more than one month hath elapsed, and that the said Monson and Brimfield Manufacturing Company did not within one month next after said demand being made as aforesaid, assign and set out to your oratrix her dower, or any part thereof in the aforesaid premises, and that the said Monson and Brimfield Manufacturing Company, or either of the members thereof, have not done, or caused the same to be done, at any time since, but on the contrary, they then refused and still refuse so to do.

But now so it is, may it please your honors, that the said Monson and Brimfield Manufacturing Company, being in no wise ignorant of the premises, but contriving and confederating with each other, and with several other persons to your orator and oratrix yet unknown, in order to wrong and injure your said orator and oratrix, and to prevent your oratrix from having her dower or just third part of and in the aforesaid premises assigned and set out to her according to the true intendment of law.

Your orator and oratrix give your honors to be informed that the said confederates pretend and give out that the said oratrix, during her coverture, and while she was the wife of the said R. M., did sign, seal, and deliver some deed, or other instrument in writing whereby she acquitted, released, and discharged all her right of dower in the aforesaid described premises.

Now your orator and oratrix charge the contrary thereof to be true, and, moreover, that the said oratrix never did make any such release \* or discharge to them, the said Monson and Brimfield \* 1907 Manufacturing Company, as hereinbefore pretended, or if she did give or execute the same, she was grossly deceived and imposed upon in relation thereto, and that the same was obtained from her, or she was

prevailed upon to execute the same by unfair means or practices used in that behalf by the said confederates.

And your orator and oratrix further charge and complain that the said pretended release or instrument was procured and brought to the said oratrix, ready drawn and prepared for execution, and that she would not have signed or executed the same, in case she had known or been fully apprised of the real purport, tenor, or contents thereof, nor was any sum or sums of money whatever paid to or received by her, as the consideration for her executing the said pretended release or instrument. Under the circumstances aforesaid, your said orator and oratrix insist that the said pretended release or instrument ought to be delivered up to be cancelled, as having been fraudulently and unfairly, and without consideration, obtained from the said oratrix.

But nevertheless the said confederates insist upon the contrary, and claim the full benefit of the said pretended release or instrument, and threaten and intend, in case your orator and oratrix proceed at law against them touching the matters aforesaid, to set up the pretended release or instrument in bar thereto.

And also, your orator and oratrix here before your honors insist that the said pretended deed or instrument, in manner and form as the same was signed, sealed, and delivered, was not a discharge or relinquishment of dower of your oratrix in the premises therein referred to, and that the same by the laws of the land, does not bar or exclude her from such dower or right in the within described lands or tenements.

And your orator and oratrix further complain, and give your honors to be informed, that the said confederates pretend that your oratrix, during the lifetime of her late husband, R. M., and while she was his wife as aforesaid, did join with her said husband in the several deeds of sale and conveyance by him made, of the said several pieces of land as hereinbefore described, and that your oratrix, by such joining in the aforesaid deeds of sale and conveyance, has lawfully barred or excluded herself from such dower or right. Now your orator and oratrix on the contrary charge and say, that your oratrix did not join with her said husband, R. M., in any deed of sale or conveyance of the before described premises, as they pretend, and that she is not, by the laws of the land, barred or excluded from her said dower or right in or to the within described lands or tenements.

In consideration of all which, and inasmuch as your orator and oratrix cannot have relief in the premises by the plain, direct, and ordinary course of the Common Law, to the end, therefore, that the said Monson and Brimfield Manufacturing Company, and the rest of the confederates, \* when discovered, may be holden to account with, or assign and set out to, your orator her dower or just third part in or to the within described premises, your orator and oratrix humbly pray that W. P., E. T. A., J. H., S. W., Jr., G. B., B. S., S. C., and G. T., all of B., in the said District of Massachusetts, gentlemen, W. B., of C., in the said District, gentleman, and J. H., Jr., of M., in said District, gentleman, all being proprietors and constituting the Monson and Brimfield Manufacturing Company, and citizens of the said State of Massa-

chusetts; and such other confederates, when discovered, may be called and required severally to answer on oath, fully and particularly, all and singular, the matters herein set forth.

Wherefore, may it please your honors, &c.

G. B.

[*Prayer for subpoena.*]

#### SECTION IV.

##### *Bills respecting the Foreclosure of Mortgages.*

##### 13. *Bill by mortgagee against the mortgagor, for a foreclosure.*

Humbly complaining, shows unto your honors the plaintiff, R. S., of, &c., that on the, &c., P. J., of, &c. [one of the defendants hereinafter named], being, or pretending to be, seised in a fee of a certain parcel of real estate, situate, &c., and bounded, &c., and having occasion for the loan of a sum of money, applied to the plaintiff to lend him the sum of \$—, and in order to secure the repayment of the same, with interest, proposed to mortgage to the plaintiff the said real estate. And the plaintiff further shows unto your honors that the plaintiff did comply with the request of the said P. J., and did accordingly lend him the said sum of \$—, and for securing the repayment thereof, with interest as aforesaid, by deed, bearing date on, &c., and made and executed by the said P. J., did grant, bargain, sell, and convey unto the plaintiff the premises above described: To have and to hold unto the plaintiff, his heirs and assigns, in fee-simple for ever, subject nevertheless to a proviso for the redemption of the said premises, on payment by the said P. J., his executors, administrators, or assigns, to the plaintiff, his executors, administrators, or assigns, of the said sum of \$—, with lawful interest for the same, within one year from the date of said deed, as by the said deed, reference thereunto being had, will more fully appear. And the plaintiff further shows, that the said sum of \$—, or any part thereof, was not paid to the plaintiff or to any person on his behalf,

\* according to the said proviso in said deed at the time therein \* 1909 mentioned, and has not now been paid to the plaintiff, but is still due and owing to him, together with a great arrear of interest thereon. And the plaintiff well hoped that the said P. J. would either have paid the plaintiff the said sum of \$—, and the interest thereon, or would have suffered the plaintiff to have peaceably and quietly held and enjoyed the said premises, and for that purpose the plaintiff has frequently applied to the said P. J., and requested him to pay the said sum of \$—, and the interest due upon the same, or else peaceably to deliver up possession to the plaintiff of the said mortgaged premises, together with all deeds, evidences, writings, &c., relating to or concerning the same, and to release all his right, title, and equity of redemption of, in, and to the said premises, to the plaintiff and his heirs, the said P. J. well knowing, as the plaintiff charges the truth to be, that the said premises are a very

scanty security for the principal and interest now due to the plaintiff thereon. And the plaintiff well hoped that the said P. J. would have complied with such, the plaintiff's reasonable requests, as in justice and equity he ought to have done. BUT NOW SO IT IS, &c. [See form No. 34, p. 1882.] And the said defendant, P. J., pretends that the said premises were mortgaged by him to, &c., whereas the plaintiff charges that, &c. And at other times the said P. J. pretends, &c., whereas the plaintiff charges, &c. All which actings, &c. [See form No. 36, p. 1883.] And that the said P. J. may discover whether there is or are any other, and what incumbrance or incumbrances upon or affecting the said mortgaged premises, or if so, in whom the same is or are vested. And that an account may be taken, by and under the direction and decree of this honorable Court, of what is due and owing to the plaintiff for principal and interest moneys upon and by virtue of his said recited mortgaged securities, and that the said P. J. may be decreed to pay and satisfy to the plaintiff what shall appear to be due and owing to him on the taking of the aforesaid account, by a short day to be appointed by this honorable Court, together with the plaintiff's costs. And in default thereof, that the said P. J., and all persons claiming under him, may be absolutely barred and foreclosed of and from all equity of redemption or claim, in and to the said mortgaged premises, and every part thereof, and may deliver over to the plaintiff all deeds, writings, and documents whatsoever in his custody, possession, or power, relating to or concerning the said premises and every part thereof, &c. [And for further relief, see form No. 38, p. 1885.] May it please, &c. [See form No. 43, p. 1887.]

\* 1910 \* 14. *Bill by a mortgagee for a foreclosure, against the surviving mortgagor, entitled as surviving devisee to the Equity of Redemption, as to one moiety for his own benefit, and as to the other in trust for himself and another individual (also a defendant) as devisees under another will.*

Humbly complaining, shows unto your honors, the plaintiff, A. H., of, &c., Esq., against S. M. C., of, &c., and G. R., of, &c., that J. S. C. now deceased, the said S. M. C., and the Reverend P. K., now deceased, being or alleging themselves to be seised of, and entitled to, the premises hereinafter particularly described, in trust for the benefit of the said J. S. C. and S. M. C., and having occasion to borrow the sum of \$5500, applied to and requested the plaintiff to lend them the sum of \$3000, part of such sum of \$5500, on the security hereinafter mentioned, and that the plaintiff complied with such request, and did accordingly lend and advance the sum of \$3000 to the said J. S. C., S. M. C., and P. K. And that, thereupon, and in order to secure the repayment thereof with interest, the said J. S. C., S. M. C., and P. K. duly executed a certain indenture of mortgage bearing date, — and made or expressed to be made between the said J. S. C., S. M. C., and P. K. of the one part, and the plaintiff of the other part. And that thereby, after reciting as therein mentioned, it was witnessed that for

and in consideration of the said sum of \$3000, to the said J. S. C., S. M. C., and P. K. paid by the plaintiff, the receipt whereof they did thereby acknowledge, they, the said J. S. C., S. M. C., and P. K., and each of them, did grant, bargain, sell, and convey unto the plaintiff, his heirs and assigns, all that capital messuage, &c., together with all and every the appurtenances, &c., to hold the said messuage, &c., unto the plaintiff, his heirs, and assigns in fee-simple forever, but subject to a proviso for redemption upon payment by the said J. S. C., S. M. C., and P. K., their heirs, executors, administrators, or assigns, unto the plaintiff, his executors, administrators, or assigns, of the said sum of \$3000, with interest after the rate of 5 per cent per annum at or upon the — day of — then next ensuing; as in and by the said indenture, reference being thereto had, will more fully appear. And the plaintiff further shows unto your honors, that the said sum of \$3000 was not paid to the plaintiff at the time, for that purpose limited by the said indenture, for the payment of the same, and that thereby the estate of the plaintiff in the said mortgaged premises became absolute at law. And the plaintiff further sheweth unto your honors, that in or about the year — the said J. S. C. died, having first made his will bearing date —, whereby he devised all real estate, including his interest in the said mortgaged premises, to the said S. M. C. and P. K. and to G. R. of —, and their heirs. And the plaintiff further shows unto your honors that the said P. K. had no beneficial interest in the said mortgaged premises; and that he died some time since, leaving \* the said S. M. C. him surviving; and that the said S. M. C. alone \*1911 now entitled to the equity of redemption of the mortgaged premises in trust, as to one moiety thereof, for his own use and benefit, and in trust, as to the other moiety, for the use and benefit of himself and the said G. R., as devisees of the said J. S. C. And the plaintiff further shows that the said sum of \$3000, together with a considerable arrear of interest accrued due thereon, is now due to the plaintiff on the security of the said premises. And that the plaintiff has frequently, and in a friendly manner, applied to the said S. M. C., and requested him to pay the same and release his equity of redemption of and in the said mortgaged premises. And the plaintiff well hoped that such his just and reasonable requests would have been complied with, as in justice and equity they ought to have been. But now so it is, may it please your honors, that the said S. M. C., combining with the said G. R., and contriving how to injure the plaintiff in the premises, refuses so to do, although your orator charges that the plaintiff did as aforesaid well and truly advance and pay the said sum of \$3000, to the said J. S. C., S. M. C., and P. K., and that for securing the repayment thereof with interest, the said J. S. C., S. M. C., and P. K. duly made and executed to the plaintiff such indenture as is hereinbefore mentioned; and that the whole of the said sum of \$3000, together with a large arrear of interest accrued due thereon, is now justly due and owing to the plaintiff on the security aforesaid. And the plaintiff charges that the mortgaged premises are a very scant security for the repayment of what is due and owing to the plaintiff on the security thereof. And the plaintiff charges

that the said G. R. is and claims to be interested in the said mortgaged premises, or some part thereof, and to be entitled to redeem the same, but he, and also the said S. M. C. refuses so to do. And the plaintiff charges that the said defendants ought either to pay what is due to plaintiff as aforesaid, or otherwise to release their equity of redemption in the said premises, but they refuse so to do. All which actings, &c. [See form No. 36, p. 1883.] And that the said defendants may answer the premises; and that an account may be taken by and under the direction and decree of this honorable Court of what is due and owing to the plaintiff for principal money and interest on the security of the said mortgaged premises; and that the said defendants may be decreed to pay unto the plaintiff what shall appear to be justly due and owing to him on the taking of the aforesaid account, together with his costs of this suit, by a short day to be appointed by this Court for that purpose, the plaintiff being ready and willing, and hereby offering, on being paid his principal money and interest and costs, at such appointed time, to reconvey the said mortgaged premises unto the said defendants, or unto either of them, as this honorable Court shall direct. And in default of such payment, that the said defendants and all persons claiming under them, may be absolutely barred and fore-  
 \*1912 closed of \*and from all right and equity of redemption in and to the said mortgaged premises and every part thereof forever. And may deliver up to the plaintiff all and every the deeds, writings, and documents in their or either of their possession, custody, or power, relating to the said mortgaged premises and every part thereof. [And for further relief, see form No. 38, p. 1888.] May it please your honors, &c. [See form No. 43, p. 1887.] [*Pray subpoena against S. M. C. and G. R.*]

### 15. *Prayer in a bill for foreclosure and sale.*

That an account may be taken, by or under the direction of this honorable Court, of what is due for the principal and interest on the said mortgage, and that the said defendants, or some one of them, may pay unto the plaintiff the money which shall be found due to him by a short day, to be appointed for that purpose by this honorable Court; or, in default thereof, that all the said defendants, and their respective heirs, executors, and administrators, and all other persons claiming, or to claim by, from, or under them, or any of them, may be absolutely barred and foreclosed of and from all right and equity of redemption of, in, and to the said estates and every part thereof; or, if on any account the plaintiff is not entitled to such foreclosure, then that the said estates may be sold, and all proper parties may join therein, and that the money so due to the plaintiff may be paid to him by and out of the money which shall be raised by such sale, &c., &c.



16. *English model form of bill in foreclosure suit, as given in schedule to the orders of 7th August, 1852.*

In Chancery.

JOHN LEE . . . . .	Plaintiff.
JOHN STYLES } . . . . .	Defendants.
and	
HENRY JONES }	

*Bill of Complaint.*

To the Right Honorable Richard, Baron Westbury, of Westbury, in the County of Wilts, Lord High Chancellor of Great Britain.

Humbly complaining, sheweth unto his Lordship, J. L., of, &c., the above-named plaintiff, as follows:—

1. The defendant, J. S., being seised in fee-simple of a farm called Blackacre, in the parish of A., in the county of B., with the appurtenances, did, by an indenture dated, &c., and made between the defendant J. S., of the one part, and the plaintiff of the other part, grant and convey the said farm, with the appurtenances, unto and to the use of the plaintiff, his heirs and assigns, subject to a proviso for redemption \* thereof, in case the defendant, J. S., his \* 1913 heirs, executors, administrators, or assigns, should, on the first day of May, one thousand eight hundred and fifty-one, pay to the plaintiff, his executors, administrators, or assigns, the sum of five thousand pounds, with interest thereon at the rate of 5 per centum per annum, as by the said indenture will appear.

2. The whole of said five thousand pounds, together with interest at the rate aforesaid, is now due to the plaintiff.

3. The defendant H. J. claims to have some charge upon the farm and premises comprised in the said indenture of, &c., which charge is subsequent to the plaintiff's said mortgage.

4. The plaintiff has frequently applied to the defendants J. S. and H. J., and required them either to pay the said debt or else to release the equity of redemption of the premises, but they have refused so to do.

5. The defendants J. S. and H. J. pretend that there are some other mortgages, charges, or incumbrances affecting the premises, but they refuse to discover the particulars thereof.

6. There are divers valuable oak, elm, and other timber-like trees growing and standing on the farm and lands comprised in the said indenture of mortgage, which trees and timber are a material part of the plaintiff's security; and if the same or any of them were felled and taken away, the said mortgaged premises would be an insufficient security to the plaintiff for the money due thereon.

7. That the defendant J. S., who is in possession of the said farm, has marked for felling a large quantity of the said oak and elm trees, and other timber, and he has, by handbills, published on the second

December instant, announced the same for sale, and he threatens and intends forthwith to cut down and dispose of a considerable quantity of the said trees and timber on the said farm.

*Prayer.*

The plaintiff prays as follows: —

1. That an account may be taken of what is due for principal and interest on the said mortgage.

2. That the defendants J. S. and H. J. may be decreed to pay to the plaintiff the amount which shall be so found due, together with his costs of this suit, by a short day to be appointed for that purpose, or, in default thereof, that the defendants J. S. and H. J., and all persons claiming under them, may be absolutely foreclosed of all right and equity of redemption in or to the said mortgaged premises.

3. That the defendant J. S. may be restrained by the injunction of this honorable Court from felling, cutting, or disposing of any of the timber or timber-like trees now standing or growing in or upon the said farm and premises comprised in the said indenture of mortgage, or any part thereof.

\* 1914 \* 4. That the plaintiff may have such further or other relief as the nature of the case may require.

Names of the defendants.

The defendants to this bill of complaint are,

J. S.

H. J.

[*Name of Counsel.*]

NOTE. — This bill is filed by Messrs. A. B. and C. D., of Lincoln's Inn, in the county of Middlesex, solicitors to the above-named plaintiff.

*Indorsement on Bill.*

In Chancery.

Master of the Rolls,

[*or* Lord Chancellor.

Vice-Chancellor.]

Lee *v.* Styles and Jones [and others.]

*Bill of Complaint.*

VICTORIA R.

To the within named defendants — greeting:

We command you and every of you, that within — days after service hereof on you, exclusive of the day of such service, you cause an appearance to be entered for you in our High Court of Chancery to the within bill of complaint of the within named —, and that you observe what our said Court shall direct. Witness ourself at Westminster, the — day of January, in the — year of our reign.

NOTE. — If you fail to comply with the above directions, you will be liable to be arrested and imprisoned.

Appearances are to be entered at the Record and Writ Clerks' office, Chancery Lane, London.

A. B. and C. D.

(*Place of Address*),

Plaintiff's Solicitors.

17. *Bill by an equitable mortgagee, by deposit, for foreclosure on sale.*

*Title and address of bill.*

Humbly complaining, &c., D. J., of, &c., the above-named plaintiff, as follows:—

1. On or about the 12th of May, 1851, the defendant M. R., then of, &c., applied to the plaintiff, for a loan of £150; which the plaintiff agreed to advance, as to £100 forthwith, and as to the remaining £50 when the defendant should apply for the same; and it was agreed that \* the defendant should give his promissory note for the said \* 1915 sum and interest, as hereinafter mentioned; and should deposit the title deeds hereinafter mentioned, as a further security for such loan.

2. The plaintiff accordingly lent and advanced to the defendant the sum of £100 on the said 12th of May, 1851; and the defendant signed and delivered to the plaintiff his promissory note in the words and figures following: [*Promissory note set out.*]

3. At the same time the defendant deposited with the plaintiff the title deeds relating to a messuage, with the buildings, garden, and appurtenances thereto belonging, situated in the parish of E., in the county of S., commonly called or known by the name of Little Yard; which had been conveyed to the defendant in fee-simple, to the usual uses to bar dower; but no memorandum of such deposit was then, or has since been, given to the plaintiff.

4. On or about the 4th of June, 1851, the defendant applied to the plaintiff to advance him the further sum of £50, in accordance with the agreement hereinbefore stated; and accordingly the plaintiff advanced the defendant the said sum of £50 on the said 4th of June, 1851; and the defendant signed and delivered to the plaintiff a promissory note in the words and figures following: [*Promissory note set out.*]

5. In or about the month of June, 1852, the defendant applied to the plaintiff to advance him the further sum of £60 for a week, under special circumstances, in order to save him the expense of a journey to London; and the defendant agreed to repay the plaintiff the said sum of £60 in a week's time, and also £5 for the accommodation. The plaintiff accordingly advanced and paid the said sum of £60, to the defendant; who, at the same time, gave him an unstamped memorandum in the words and figures following: [*Memorandum set out.*]

6. The defendant made default in payment of the said sum of £60 and interest; and in the month of July or August, 1852, the plaintiff had an interview with the defendant, and there proposed that the de-

fendant should execute to him a legal mortgage of the said freehold premises, of which the title deeds had been so deposited as aforesaid, together with certain leasehold property at C., which the defendant then stated he had recently agreed to purchase; to secure the said several loans and interest thereon, at the rate of five per cent per annum; to which proposal the defendant agreed; but such mortgage was never completed.

7. The whole of the three several sums of £100, £50, and £60, amounting together to the sum of £210, together with interest thereon, still remains due from the defendant to the plaintiff.

8. The defendant subsequently became involved in pecuniary difficulties; and on or about the 18th of October, 1852, he left his home, and has not since been seen or heard of; although repeated and diligent inquiries have been made for him.

\* 1916

\* *Prayer.*

The plaintiff prays as follows:—

1. That an account may be taken of what is due to the plaintiff on security of the said deposit of deeds: and that the defendant may be decreed to pay to the plaintiff what shall, on taking the said account, be found due to him, together with the costs of this suit; by a short day to be appointed for that purpose; and in default of such payment, that the defendant may be forever barred and foreclosed of all right and equity of redemption in the said hereditaments at E. aforesaid; and that the said hereditaments and the legal estate therein may be conveyed to the plaintiff: or otherwise that the same may be sold; and that the produce of such sale may be applied to the satisfaction of what shall be found due to the plaintiff; and for the above purposes that all necessary directions may be given.

2. That some proper person may be appointed by the order of this honorable Court to receive the rents and profits of the said hereditaments.

3. That the plaintiff may have such further or other relief as the nature of the case may require.

18. *Bill by executors of mortgagee, for specific performance of agreement to take a transfer; or for foreclosure or sale.*

(*Title and address of bill.*)

Humbly complaining, &c., T. M., of, &c., W. S., of &c., and J. C. of, &c., the above-named plaintiffs, as follows:—

1. On the 7th day of May, 1852, G. C., late of R., deceased, lent and advanced to the defendant E. V. the sum of \$3000 on the security hereinafter stated.

2. For securing the said sum of \$3000 and interest the defendant E. V. signed and delivered to the said G. C. the following agreement:

[*Articles of agreement set out verbatim, by which, after reciting the deposit of a lease, a policy of insurance, and gas shares, with G. C., E. V. declared that they were deposited as a security for \$3000, and interest at 5 per cent; and E. V. charged the leasehold property, the policy, and gas shares, and also a certain rent charge to which he was entitled in reversion, with the payment of the money and interest, and E. V. agreed, when required to execute a mortgage and transfer of the said premises, shares, policy of insurance, and rent charge; with power of sale, and such other clauses as G. C. should require.*] The defendant E. V. at the same time deposited with the said G. C. the several documents mentioned in the said agreement.

3. The said G. C. died in the month of April, 1853, having first duly made and published his last will and testament in writing, and

\* thereby appointed the plaintiffs executors; who, after his de- \* 1917  
cease, proved the same in the appropriate Court.

4. The said sum of \$3000 is still due and owing on the said security, with interest thereon.

5. The defendant T. E., by letters signed by him, agreed with the plaintiffs, that if they would postpone giving notice of the said agreement to the tenants of the said property, and to the said gas and insurance offices, he would take a transfer of the said security. The plaintiffs accordingly, relying on such agreement, forbore to give such notice; but the defendant T. E. now refuses to perform his said agreement. The defendant T. E. acted in the said matter in concert with the defendant E. V., for the purpose of delaying the plaintiffs' proceedings against him, and enabling him to dispose of portions of his property; and the defendant E. V. has accordingly realized portions of his property, and placed the same out of the hands of his creditors.

### *Prayer.*

The plaintiffs pray as follows:—

1. That an account may be taken of the amount due and owing on the said security.

2. That the said agreement with the defendant T. E. may be specifically performed; and the defendant T. E. may be decreed to pay to the plaintiffs the amount due on their said security, with the costs of this suit; the plaintiffs being willing, and hereby offering, on such payment to transfer to him the said security; or otherwise that the amount so due, together with the costs of this suit, may be paid to the plaintiffs by the defendant E. V., by a short day to be appointed for that purpose; and that, in default of such payment, the defendant E. V., and all persons claiming under him, may be debarred and foreclosed of and from all right and equity of redemption in the said mortgaged premises; and may be decreed to convey and transfer the same to the plaintiffs; or otherwise that the said mortgaged premises may be sold, and the proceeds thereof applied in payment of the amount due on the said security, and the plaintiffs' costs of this suit.

3. That some proper person may be appointed, under the order and direction of this honorable Court, to collect, receive, and get in the rents and profits of the said leasehold premises, and the dividends of the said shares, and the said rent charge, when the same shall become payable.

4. That the plaintiff may have such further or other relief as the nature of the case may require.

\* 1918 \* 19. *Form of Bill for Foreclosure, prescribed in the Chancery Rules of New Hampshire.*

TO THE SUPREME JUDICIAL COURT.

HILLSBOROUGH, ss.

T. B., of, &c., complains against T. D., of, &c., T. M., of, &c., and T. A., of, &c., and says that on the — day of — he loaned to said T. D. the sum of \$1000, at his request, to be repaid to him in one year, with interest, and, for the purpose of securing the payment thereof, the said T. D. made, executed, and delivered to the plaintiff his promissory note of that date, whereby, for value received, he promised to pay to him or to his order \$1000 in one year, with interest, and a deed of mortgage of that date of a certain tract of land, situate in —, bounded, &c., containing, &c., with condition that if said T. D., his heirs, executors, or administrators should pay to said plaintiff the sum of \$1000, and interest, in one year, agreeably to his promissory note of even date therewith, the said deed should be void, as by said deed, duly executed, acknowledged, and recorded, ready in Court to be produced, appears: and afterwards, said T. D. mortgaged the same premises to said T. M., to secure to him a certain debt then due and owing to him, and afterwards released the same premises to the said T. A., who is now in possession of the same; and though the said defendants have been often requested to pay said sum of \$1000, and interest, since the same became due, yet the same has never been paid, and is still due. Wherefore the plaintiff prays that it may be ordered and decreed by said Court, that, unless the said sum of \$1000 and interest shall be paid by said defendants, or one of them, within such reasonable time as the Court may appoint, they, and each of them, may be forever foreclosed from all right of redeeming said premises, and for such other relief as may be just.

T. P.

A. S., *Solicitor.*

SECTION V.

*Bills respecting the Redemption of Mortgages.<sup>1</sup>*

20. *Bill by the heir-at-law of the Mortgagors for the redemption of Freehold Lands.*

To, &c.

Humbly complaining, sheweth unto your honors, the plaintiff, J. G., of, &c., that J. G., the elder, late of, &c., but now deceased, and

<sup>1</sup> For bill to redeem lands sold under a alleging tender of money due, and defects in power of sale contained in a mortgage deed, the proceedings for a sale, see *Burnet v. Den-*

E. his \* wife, now also deceased, the late father and mother of the \* 1919 plaintiff, were in the right of the said E., seised in fee-simple of, or otherwise well entitled to, two parcels of real estate, bounded and described as follows: [*here insert boundaries, &c.*] And the plaintiff further sheweth, that the said J. G. the elder, and E., his wife, in or about the year —, made some conveyance and assignment of the said premises unto W. B., of, &c., the defendant hereinafter named, by way of mortgage for securing the repayment of a certain sum of money, with interest, then advanced to the said J. G. by W. B., or by J. B., then of, &c., on the part of, and as the agent of, the said W. B.

And the plaintiff further sheweth unto your honors, that the said W. B., upon or soon after the making of the said security, entered into the possession of the said mortgaged premises, or into the receipts of the rents and profits thereof, and hath ever since continued in such possession and receipt, and the said W. B., or the said J. B., on his behalf, also possessed himself of all the title deeds relating to the said premises. And the plaintiff further sheweth that the said J. G. the elder departed this life in or about the year —, and that the said E., having survived her husband, departed this life on or about, &c., intestate, and without having made, after the death of her said husband, any conveyance or disposition of such right and interest as she retained at his death in the premises, leaving the plaintiff her eldest son and heir-at-law, who thereupon became entitled to the equity of redemption of the said mortgaged premises.

And the plaintiff further sheweth unto your honors, that the said W. B. from time to time made some small payments to the said J. G. the elder, in his lifetime, and after his death to the said E., out of the rents and profits of the said premises. And the said W. B. applied the greater part of such rents and profits to his own use, and by means thereof the said W. B. hath been more than repaid the principal and interest due to him on the security of the said premises. And the plaintiff hath re-

niston, 4 John. Ch. 35. Decree in the same case, pp. 43, 44.

In Massachusetts, a suit to redeem real estate from an outstanding mortgage may be brought in the county within which the premises are situate. Pub. Stats. c. 181, § 31: see *Burlingame v. Hobbs*, 12 Gray, 370. The plaintiff must be entitled to redeem when the bill is filed, and not merely at the hearing. *Bernard v. Topfritz*, 160 Mass. 162. After a foreclosure sale, there is no right of redemption at Law or in Equity, apart from statute. *Parker v. Daeres*, 130 U. S. 43. A suit to redeem is a suit in Equity, and is subject to the rule that he who seeks equity must do equity. *Emerson v. Atkinson*, 159 Mass. 356, 362; *Dary v. Kane*, 158 Mass. 376; *Shaw v. Abbott*, 61 N. H. 254. In a bill to redeem, the offer to redeem is an essential feature. *Emerson v. Atkinson*, 159 Mass. 356, 360; *Way v. Mullett*, 143 Mass. 49; *Brown v. South Boston Savings Bank*, 148

Mass. 300, 307; *Kopper v. Dyer*, 59 Vt. 477, 489; *Goldsmith v. Osborne*, 1 Edw. Ch. 560.

In Massachusetts a bill to redeem land from a mortgage is within the St. of 1883, c. 223, § 13, which provides that suits may be brought in any country where a transitory personal action between the same parties might be brought: the interest and title of an administrator in and to an equity of redemption are sufficiently set forth in a bill to redeem, which, in this respect, follows as closely as possible the form enacted with the above statute. In such a bill an averment that the defendant's testate, who devised all his real estate to the defendant, for a long time before his decease, and the defendant himself during all the time since the testate's decease, occupied the premises without accounting for the rents and profits, sufficiently sets forth the defendant's possession. *Dary v. Kane*, 158 Mass. 376.

quently applied to the said W. B., and requested him to come to an account for the rents and profits of the said premises so received by him, and to pay over to the plaintiff what he should appear to have received beyond the amount of the principal and interest due to him, and to deliver up the possession of the said mortgaged premises; and the plaintiff well hoped that the said defendant would have complied with such requests, as in justice and equity he ought to have done, but that the said W. B., acting in concert with divers persons unknown to the plaintiff, refuses to comply therewith. TO THE END THEREFORE, that, &c. [See form No. 32, p. 1902.]

\* 1920 \* And that the said defendant may answer the premises, and that an account may be taken of what, if anything, is due to the said defendant for principal and interest on the said mortgage, and that an account may also be taken of the rents and profits of the said mortgaged premises, which have been possessed or received by the said defendant, or by any other person or persons by his order or for his use, or which without his wilful default or neglect might have been received,<sup>1</sup> and if it shall appear that the said rents and profits have been more than sufficient to satisfy the principal and interest of the said mortgage, then that the residue thereof may be paid over to the plaintiff; and that the plaintiff may be permitted to redeem the said premises, the plaintiff being ready and willing, and hereby offering to pay what, if anything, shall appear to remain due in respect to the principal and interest on the said mortgage; and that the said defendant may be decreed to assign and to deliver up possession of the said mortgaged premises to the plaintiff, or to such person as he shall direct, free from all incumbrances made by him or any person claiming under him, and may deliver over to the plaintiff all deeds and writings in his custody or power relating to the said mortgaged premises. [And for further relief, see form No. 38, p. 1885.] May it please, &c. [See form No. 43, p. 1887.]

21. *Bill to redeem by purchaser of an Equity of Redemption from the Assignee in Insolvency of the Mortgagor — alleging possession by the defendants — claiming an account of rents and profits, and money received for losses under Policies of Insurance on the property mortgaged, in Circuit Court of the United States.*

To the Judges of the Circuit Court of the United States within and for the District of Massachusetts, sitting in Equity :

W. H., of S., in the county of P. in the Rhode Island District, a citizen of the State of Rhode Island, brings this his Bill of Complaint against the President, Directors, and company of the W. Bank, a Corporation legally created under the laws of the Commonwealth of

<sup>1</sup> If it is intended to claim for waste of the mortgagee in possession, it must be charged in the bill: otherwise there can be no issue in regard to it. *Gordon v. Hobart*, 2 Story, 260,

261. And if the question of waste is not referred to the Master, he cannot consider it, even on the consent of the parties. *Gordon v. Hobart*, *supra*.



Massachusetts, and located and transacting business in the city and county of W. in said Commonwealth, all citizens of the State of Massachusetts.

And thereupon your orator complains and says: That one S. H., of N., in said county of W., and Commonwealth of Massachusetts, on or about the fourteenth day of October, A. D. 1839, was seised in fee-simple \* of, or otherwise well entitled to, certain real estate \* 1921 situated in said N., particularly described in certain deeds of conveyance of the same to said S. H., — one from J. F. and S. W., dated December 17, 1821, and one from J. E., dated October 11, 1822, recorded in the Registry of Deeds for the County of W., book 242, page 32; also a deed from J. E. to said S. H., dated May 3, 1825, recorded in said Registry of Deeds, book 248, page 457, copies of which deeds are hereunto annexed, and made a part of this bill marked —.

And your orator further shows, that the said S. H., on or about said fourteenth day of October, A. D. 1839, made a conveyance of said premises, by way of mortgage, to one H. M. H., of B. in the county of S., and Commonwealth of Massachusetts, to secure the repayment of a sum of money, with interest then due from the said S. H. to the said H. M. H.; and that subsequently and on or about the seventh day of March, A. D. 1847, the said H. M. H. transferred and assigned all his interest in said mortgage deed, and in the premises therein described, and in the debt thereby secured, to the defendants. Copies of said mortgage deed, and of the assignment thereof, are hereunto annexed, marked, &c., and made a part of this bill.

And your orator further shows, that after the making of the said transfer, and on the third day of December, A. D. 1849, the said defendants entered into the possession of the said mortgaged premises, or into the receipt of the rents and profits thereof, and have ever since continued in such possession and receipt.

And your orator further shows, that since the said mortgaged premises have been in the possession of the defendants, the mills and principal buildings thereon have been destroyed by fire, and that the same were insured by the said S. H., who occupied said premises under lease from said defendants for the benefit of said defendants, as further security for said mortgage debt, and that large sums have been paid to said defendants, on said policies, and that they still hold other policies upon the machinery in said mills, which was also destroyed by fire, which policies have been assigned to said defendants as further security for, and in payment of, said mortgage debt, and that the whole amount of said policies is sufficient to cancel the greater part, if not the whole, of the residue of said debt, which had not otherwise been paid by said S. H., and that if a just account were taken of such payments, and of the sums received or to be received on said policies, which are now due and payable, and of said rents and profits received by said defendants, the whole of said mortgage debt would be found to be justly paid and discharged.

And your orator further shows, that on the — day of —, A. D.

184-, the equity of redemption which the said S. H. retained and owned in said property, was transferred to one A. W. P. by assignments in the course of proceedings under the Insolvent Law of \*1922 said \*Commonwealth of Massachusetts, to which the said S. H. was a party, and that said A. W. P., as such assignee of said S. H., by his deed dated the twenty-fourth day of June, A. D. 1844, conveyed said equity of redemption to your orator, a copy of which deed is hereunto annexed, marked, &c.

And your orator further shows, that being the owner of said right of redemption in said property, he has applied to said defendants and requested them to come to an account for the rents and profits of the said premises so received by them, and of the moneys received by them from said S. H., for the interest and principal of said debt, and from the said policies of insurance, and to deliver up the possession of said mortgaged premises to him, upon being paid what, if anything, should be found to be justly due to them upon said account, which your orator is and has been ready and willing to pay, and is ready to bring the same into Court, if anything shall be found to be justly due to said defendants upon the proper taking of said account. And your orator well hoped that the said defendants would have complied with such requests, as in justice and equity they ought to have done; but the said defendants, acting in concert with divers persons unknown to your orator, refuse to comply therewith, and insist upon holding possession of said estate, and foreclosing your orator's right of redemption therein, and retaining said policies and the amounts received thereon, and said rents and profits, without accounting for the same.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and the said defendants may answer the premises, and that an account may be taken of what, if anything, is due to the said defendants for principal and interest on the said mortgage, and that an account may be taken of the rents and profits of the said mortgaged premises, which have been possessed or received by the said defendants, or by any other person or persons, by their order or for their use, or which, without their wilful default or neglect, might have been received; and also of all sums that may have been paid by said S. H. or others towards the principal and interest of said mortgage debt; and also of the policies of insurance and other securities which the said defendants have received, and of the sums which they have or might have realized therefrom, on account of the principal and interest of said debt, and of the value of such policies and other securities now in their hands, on account of said debt, which they have not sold or turned into money; and that the said defendants be ordered to apply the same to the payment of said debt; and that, if it shall appear that said rents and profits, and the payments and the proceeds of said policies and other securities have been and are more than sufficient to pay the principal and interest of said mortgage debt, that the residue may be paid over to your orator; and that your

\*1923 orator may be permitted \*to redeem the said premises, your orator being ready and willing, and hereby offering to pay what,  
1922

if anything, shall appear to remain due, in respect to the principal and interest on the said mortgage; and that the said defendants may be decreed to deliver up possession of the said mortgaged premises to your orator, or to such person as he shall direct, free from all incumbrances made by them, or any person claiming under them, and may deliver to your orator all deeds and writings in their custody or power relating to the said mortgaged premises, and that your orator may have such further and other relief in the premises as the nature of this case shall require, and to your honors shall seem meet.

May it please your honors to grant unto your orators the *subpoena* of the United States of America, to be directed to the said President, Directors, and Company of the W. Bank, thereby commanding them at a certain day, and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable Court, and then and there to answer all and singular the premises, and to stand to, abide, and perform such order and decree thereon, as to your honors shall seem meet.

W. H.

*By his Solicitors, T. A. J. and B. F. B.*  
B. & B., Solicitors.

22. *Statements in a bill by an assignee of a mortgagor against the mortgagee, who took an absolute deed of the premises, but as security for a debt; and went into possession and sold the premises to bona fide purchasers without notice.*<sup>1</sup>

Bill by E. W., of, &c., as assignee of N. W., against A. B., of, &c., states that, on the — day of —, N. W. was seised of a tract of land in C., containing about eleven acres and a half; that about one acre of this land had been sold and conveyed by N. W. to J. F., who, having mortgaged it back to secure the payment of the consideration money, N. W. had entered for breach of condition, and to foreclose the mortgage; that all but the J. F. acre was incumbered by two mortgages, both held by the defendant: the first being a mortgage from said N. W. to F. W., on which there was then due for principal and interest the sum of \$1487 $\frac{32}{100}$ , the defendant being the executor and trustee under the will of F. W., in that right holding this mortgage; and the second being a mortgage from N. W. to the defendant, nominally to secure the sum of \$1200 and interest, but really to secure such sums as might be advanced by the defendant to N. W.; and \* that on this last-mentioned mortgage there was then due, for \* 1924 such advances, the sum of four hundred dollars.

The bill further states, that at the same time N. W. also owed the defendant, personally, eight dollars  $\frac{1}{100}$ , and to him as agent for the heirs of N. W., senior, the sum of one hundred and thirty-six dollars  $\frac{1}{100}$ ; that N. W. was much embarrassed in his affairs, and at the press-

<sup>1</sup> Wyman v. Babcock, 2 Curtis, 386.

ing solicitation of the defendant, who was his brother-in-law, and of W. W., his brother, he consented to make a deed of the said land, excepting the J. F. acre, to the defendant, absolute in form, but intended to stand as security for what N. W. thus owed; that the conveyance was made for that purpose only, and the defendant went into possession; that none of the notes held by the defendant were surrendered or cancelled, the same being retained because the land was held as security only; that the defendant was to have the management of the land and receive the rents and profits, and apply them towards the accruing interest; and if there should be any excess, towards the principal, and that N. W. was to have the right to redeem, at any time when he should be able to do so.

The bill further states, that afterwards the defendant, without any notice to N. W. of his intention to sell, or to purchasers of the nature of his title, sold the land by an absolute title, to *bona fide* purchasers, without notice; and it prays for an account of the rents and profits while held by the defendant, and of the value of the land when sold, and that after deducting the amount for which the land stood as security, the residue may be paid to the plaintiff, who alleges himself to be the assignee, by deed, for a valuable consideration, of all N. W.'s equity in the premises.

23. *Bill to have goods redelivered which have been deposited as a security for money lent.*

Humbly complaining, sheweth unto your honors the plaintiff, A. S., of, &c., against P. S., of, &c., that the plaintiff having occasion for a sum of money for the purposes of his business, made application to said P. S., the said defendant, to lend him the same, and thereupon the said P. S., on or about —, advanced and lent to the plaintiff the sum of \$—, and in order to secure the repayment thereof with interest, the plaintiff deposited with the said defendant a box of tanned boot legs and tops, which were of the value of \$— and upwards, and at the same time executed and delivered to the said defendant, a bill of sale of the said goods so deposited with him; but it was not meant and intended thereby, either by the plaintiff or the said defendant, that the said transaction should amount to an absolute sale of the said goods to the

\* 1925 said defendant, but it was expressly agreed between the \* plaintiff and the said defendant, that the plaintiff should nevertheless be at liberty to redeem the same. And the plaintiff further sheweth, that, being desirous to redeem the said goods, he has frequently applied to the said P. S., and has offered to repay him the said sum of \$—, with lawful interest thereon, on having the said goods redelivered to him, with which just and reasonable requests the plaintiff well hoped that the said P. S. would have complied, as in justice and equity he ought to have done. BUT NOW SO IT IS [see form No. 34, ante, p. 1882], &c. TO THE END, &c. [see form No. 37, p. 1884]. And that the said defendant may answer the premises, and that an account may be taken

of what is due to the said defendant for principal and interest in respect of the said loan of \$——, and that upon payment thereof by the plaintiff the said defendant may be decreed to deliver over to the plaintiff the said goods so deposited with him as aforesaid, [*and for further relief, see form No. 38, p. 1885*]. May it please, &c. [*See form No. 43, p. 1887.*]

24. *Bill to redeem by heir<sup>1</sup> of mortgagor, alleging possession, receipt of rents and profits, commission of waste, and actual occupation of part of the premises, by mortgagee.*

## SUPREME JUDICIAL COURT.

In Equity,

ESSEX, ss.

JOHN MOORE . . . . .	Plaintiff.
HENRY DIX . . . . .	Defendant.

*Bill of Complaint.*

To the Honorable the Justice of the Supreme Judicial Court.

John Moore, of Newbury, in said county of Essex, trader, the above-named plaintiff, brings this his bill of complaint against Henry Dix, of Danvers, in said county of Essex, merchant, and thereupon the plaintiff complains and shows as follows:—

1. That Amos Moore, of said Danvers, deceased, the father of the plaintiff, being seised in fee-simple of a farm, situate in said Danvers, bounded and described as follows [*here give description and boundaries*], called the “Baker Place,” did, by a deed of mortgage, dated the first day of May, one thousand eight hundred and sixty, grant and convey the said farm, with the appurtenances, unto the said Henry Dix, and to his heirs and assigns, with the proviso or condition that if the said Amos, his heirs, executors, administrators, or assigns, should in one year from the date thereof, pay to the said Henry Dix, his \* executors, administrators, or assigns, the sum of five thousand \* 1926 dollars and interest thereon, agreeably to his promissory note bearing even date with said mortgage deed, the said deed should be void, as by the said deed duly executed, acknowledged, and recorded, and here in Court to be produced, will more fully appear.

2. That the said sum of five thousand dollars and interest was not paid at the time appointed for that purpose.

3. That the said Amos Moore departed this life intestate, on the tenth day of May, 1863, leaving the plaintiff his only child and heir, who thereupon became entitled to the equity of redemption of the said mortgaged premises.

4. That the said Henry Dix entered into the possession of the said

<sup>1</sup> By statute in Massachusetts, the executor or administrator of a deceased owner of an equity of redemption may maintain a bill to

redeem as well as the heir or devisee. Pub. Stats. c. 181, §§ 39, 40.

farm on the — day of —, and into the receipt of the rents and profits thereof, and still retains the same.

5. That said Amos Moore, in his lifetime, at various different times, paid the defendant large sums of money upon and towards the amount of said promissory note and the interest thereon.

6. That the defendant, since he took possession of said farm, has cut large quantities of wood and timber on it and sold the same, and received large sums of money therefor.<sup>1</sup>

7. That the defendant has himself personally occupied a part of the dwelling-house on said farm.<sup>2</sup>

8. That the plaintiff has frequently applied to the defendant and requested him to render a just and true account of the said rents and profits — of the payments made towards the mortgage debt — of the sums received for said wood and timber, and the rent with which the defendant should be charged for his occupation of the said house; and has offered to pay him any balance there may be justly due on said promissory note and interest, after making the proper deductions and allowances, and has requested him to deliver up the said farm to the plaintiff; but the defendant refuses so to do.<sup>3</sup>

Whereupon the plaintiff prays as follows:—

1. That an account may be taken of the rents and profits which have been received by the defendant, or which, without his wilful default, he might have received since he took possession of the said premises.

2. That an account may be taken of the sums of money paid to the defendant by said Amos Moore.

\* 1927 \* 3. That an account may be taken of the said wood and timber so cut on the premises and sold by the defendant.

4. That the value may be fixed and an account may be taken of the rent of that part of said house occupied by the defendant.

5. That an account may be taken of what is due and owing upon said promissory note for principal and interest; and, in taking said account, that rests may be made from time to time, when and as the rents, profits, payments, money received for wood and timber, and the occupation rent shall appear to have exceeded the interest in arrear.

6. That the plaintiff may be declared entitled to redeem said mortgaged premises upon payment of what, if anything, shall be found remaining due to the defendant in respect of the said principal and interest on said promissory note; and that the defendant may be ordered by a decree of this Court, upon said payment being made to the de-

<sup>1</sup> If it is intended to claim for waste of the mortgagee in possession, it must be charged in the bill, otherwise there can be no issue in regard to it. *Gordon v. Hobart*, 2 Story, 260, 261. And if the question of waste is not referred to the Master, he cannot consider it, even on the consent of the parties. *Gordon v. Hobart*, *supra*; *ante* p. 1240, note 5.

<sup>2</sup> See *ante*, p. 1239, n.; *Trulock v. Robey*, 15 Sim. 265.

<sup>3</sup> The demand for an account under the Revised Statutes of Maine, 1840, c. 125, § 16, must be made upon the party having the legal record title to the mortgage; and an account rendered by a mortgagee, upon the statute demand, covering compound interest, and so exceeding the notes the mortgage was made to secure and legal interest, cannot be regarded as such an account as the statute requires. *Stone v. Locke*, 46 Maine, 445.

fendant, or into the hands of the clerk of this Court, to surrender and deliver up possession of said premises to the plaintiff, or in such other manner as he shall appoint or direct.

7. That the plaintiff may have such further or other relief as the nature of the case may require.

8. That a writ of *subpœna* may issue, directed to the said Henry Dix, commanding him to be and appear before this Court, to be holden in and for the county of Essex, on a day and under a pain therein specified, and then and there, full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein, as to this Court shall seem meet.

## SECTION VI.

### *Bills for Account.*

25. *Bill for an account by brokers employed to purchase stocks, and for injunction against suit.* [*Modern English Form.*]

[*Title, &c.*]

1. The plaintiff, in the month of —, in the year —, entered into an arrangement with — and — the above-named defendants, that the said defendants should, from time to time, as the brokers of the plaintiff, purchase on his behalf certain foreign stock or securities, then commonly called or known by the names, &c., the price or purchase-money of which the defendants were to advance; but the plaintiff engaged on each transaction to deposit with the said defendants certain securities, that is to say, &c.

\* [*The bill then proceeds to state that purchases had been made, \* 1928 moneys paid and advanced on both sides, and securities given by the plaintiff to the defendants, and that the defendants had sold certain Spanish debentures and scrip of the plaintiff at a lower price than they ought to have done, without the plaintiff's consent.*]

3. The accounts in respect of the before-mentioned transactions and dealings are still open and unsettled; nevertheless, the defendants have commenced and are prosecuting an action at law against the plaintiff for the recovery of the sum of £ —, which they allege is the balance or sum of money coming to them in respect of said transactions.

4. The plaintiff, however, charges, that if the accounts between the plaintiff and defendants were properly taken, a considerable balance would be coming from the defendants to the plaintiff.

5. The said accounts cannot be properly taken except in a Court of Equity.

The plaintiff prays as follows: —

1. That the defendants may make a full and true discovery and disclosure of and concerning all and singular the transactions and matters aforesaid, and that an account may be taken by and under the direction

and decree of this honorable Court, of all dealings and transactions between the plaintiff and the defendants.

2. That in taking such account the defendants may be charged with the amount of dividends or coupons which were due on the said Spanish debentures at the time of the aforesaid alleged sale thereof by the said defendants, and also with such sums of money as would have been produced by the sale of such debentures, if the same had been sold at the price or rate of £6 per each £100 of the said stock.

3. That in taking such account the defendants may not be allowed to charge the plaintiff with any sums of money which shall appear to have been paid or applied by them in the purchase of stocks or securities which were never actually transferred or delivered to the said defendants.

4. That the defendants may be charged with all benefit and advantage obtained by them in the said transactions of buying and selling, for and on account of the plaintiff, beyond the amount of the usual and regular commission or brokerage.

5. That the balance which shall be found due upon taking such account may be paid by the defendants to the plaintiff, the plaintiff being ready and hereby submitting to pay to them any balance which shall be found due from him to the said defendants on the aforesaid accounts.<sup>1</sup>

6. That in the mean time the said defendants may be restrained by the order and injunction of this honorable Court from further  
\* 1929 proceeding \* in the said action at Law commenced by them against the plaintiff as aforesaid, and from commencing or prosecuting any other action or proceedings at Law against the plaintiff in respect of or concerning the matters aforesaid or any of them.<sup>1</sup>

26. *Substance of a bill by an administrator of a cestui que trust, for an account and payment of moneys received by the trustee for timber cut from the land held in trust and sold by him.*

Aaron Phillips v. Sarah G. Allen.

The bill sets forth that the plaintiff is administrator of the estate of G. A. A., deceased, who was the minor child and sole heir of A. A.,

<sup>1</sup> Although usual, it seems, according to *Clarke v. Tipping*, 4 Beav. 588, not to be necessary for the plaintiff to submit to account. *Jervis v. Berridge*, L. R. 8 Ch. 351, 357. But see *Inman v. Wearing*, 3 De G. & Sm. 731; *Knebell v. White*, 2 Y. & C. Exch. 15.

<sup>1</sup> A general allegation that the accounts are of an intricate nature, is insufficient to entitle the plaintiff to maintain a bill for an account, but it must be supported by specific statements of facts showing the intricate and complex nature of the accounts. *Padwick v. Hurst*, 23 L. J. Ch. 657; 18 Beav. 578, M. R. In *Phillips v. Phillips*, 9 Hare, 471, a demurrer to a bill for an account was allowed, inasmuch as it did not

appear that the account between the plaintiff and the defendant was mutual, or that the payments forming one side of the account were other than matters of set-off as against the receipts on the other side, and notwithstanding a statement in the bill that the defendant had in a particular transaction acted as the agent of the plaintiff in receiving moneys on his account. See also *Foley v. Hill*, 1 Ph. 398; 2 H. L. Cas. 28; *Fluker v. Taylor*, 3 Drew. 183; *Bartlett v. Parks*, 1 Cush. 82. *As to a bill for account by one tenant in common against another*, see *Leake v. Cordeaux*, 4 W. R. 806; *M'Mahon v. Burchell*, 2 Ph. 127.



deceased; that R. A., deceased, by his will, devised to his wife, the defendant, the rents, profits, income, and improvement of all his real estate during the time she should remain his widow, with remainder in fee, of a portion of the land, to his son G. F. A., in trust, for the benefit of A. A. during his life, and after his death to convey the same in fee to the lawful issue that he might have born to him after the date of the will; and providing further, in said will, that, as G. F. A. was then a minor, the defendant should execute the trust as long as she lived. The bill further alleges that S. D. A. was the mother and sole heir of G. A. A., and that she also had died, leaving the plaintiff her father and sole heir;<sup>2</sup> that after the death of A. A. and G. A. A., the defendant duly accepted the trust, gave bond, and entered upon the discharge of the same; that S. D. A., in her lifetime, exhibited a bill of complaint against the defendant to compel the conveyance of the estate, subject to the defendant's life-estate; and after the death of said S. D. A., the plaintiff exhibited a bill of revivor against the defendant, setting forth the facts, on which a decree in his favor was made; that before entering upon the trust, or giving bond for the due performance thereof, the defendant entered upon the land and committed strip and waste thereof, and cut off and sold wood and timber therefrom, to the injury of the inheritance.

The prayer was for an account, and for a decree for the payment of such sum as should be found due, and for further relief.

## \* SECTION VII.

\* 1930

*Bill for Contribution.<sup>1</sup>*

27. *A bill to obtain an adjustment of a general average loss, and payment by the defendants of their contributory shares.*

To the Judges of the Circuit Court of the United States for the District of Massachusetts.

L. L. S., G. M. C., and G. B., of the city, county, and State of N. Y., and W. B., of S., in the State of C., merchants and citizens of the said States, and of the United States; the Sun Mutual Ins. Co., the N. Y. Mut. Ins. Co., and the General Mut. Ins. Co., corporations established within and by the authority of the State of N. Y., and doing business in the city of N. Y., bring this their bill of complaint against T. G. C., G. H., O. E., P. C., W. A., and against D. G. and J. P., copartners; S. A. E., C. H. M., I. K. M., and P. T. J., copartners, under the firm of C. H. M. & Co., all of B., in the Commonwealth of Mass., and citizens of the U. S., and of the said Commonwealth of Mass.

And thereupon your orators complain and say, that on the — day of —, the said S., C., G. B., and W. B. were owners of a certain

<sup>2</sup> The bill is not multifarious by reason of this averment. Phillips v. Allen, 5 Allen, 85.

<sup>1</sup> Sturgess v. Cary, 2 Curtis, 59; see Merithew v. Sampson, 4 Allen, 192.

vessel, — a barque called the Vernon, — and that the said several corporations were insurers thereon, to the full amount of her value, against the perils of the seas, and other perils in the policies of insurance mentioned; that on the — day of —, said vessel was laden with a cargo of cotton and merchandise, owned by, and consigned to, the said several defendants, as appears by the said several bills of lading, here in Court produced, and made part of this bill; that on said — day of —, said vessel set sail and departed from —, in the State of —, bound for Boston aforesaid; that on the night of the — day of — then next ensuing, said vessel was in Massachusetts Bay, in a heavy gale, and, &c. [*Here describe the circumstances of a voluntary stranding for the safety of the ship, cargo, and lives of those on board.*]

Your orators further show that, afterwards, the cargo on board said vessel was safely landed and delivered to the said defendants respectively, and that the said vessel was afterwards got off, and the damage occasioned by her being so voluntarily stranded repaired.

Your orators further show that said vessel, her freight and cargo, were in imminent danger, and would in all probability have been totally lost, if the cables had not been slipped, and said vessel run ashore as aforesaid; and that by the said voluntary stranding the same were saved and preserved to the respective owners thereof.

\* 1931 \* Your orators further allege, that by the said voluntary stranding great damage was done to said vessel, and heavy expenses incurred in consequence thereof, and in getting her off and repairing said damages; and that the owners of said vessel are entitled to demand and receive of the owners of her cargo their respective proportions of the damage, loss, and expenses so incurred, the same being a sacrifice made and incurred by the owners of said vessel, for the common benefit of the vessel, cargo, and freight, and all interested therein.

Your orators further show, that, in consequence of the damage suffered by said vessel as aforesaid, the owners thereof abandoned the same to the said corporations, the insurers thereon, and the said corporations accepted said abandonment, and paid the sums by them respectively insured, and thereby became assignees of, and subrogated to, all the rights of the owners of said vessel, to demand and receive a contribution from the owners of the said cargo for the damages, losses, and expenses incurred for the general benefit.

Your orators further show, that on the — day of — they caused to be prepared a general average adjustment, showing the amount of the losses, damages, and expenses incurred by reason of the said voluntary stranding, and of the apportionment thereof upon the said vessel, her cargo and freight, and the several owners thereof, and that by said adjustment it appeared that the said T. G. C. ought to pay the sum of \$—; the said P. C. the sum of \$—, the said G. & P. the sum of \$—; the said C. H. M. & Co. the sum of \$—; the said O. E. & Co. the sum of \$—, &c., &c.; and that the said W. A. is entitled to receive the sum of \$—, as will appear by reference to said adjustment, here

in Court to be produced, and said several defendants were then respectively requested to pay the sums from them due as aforesaid.

And your orators well hoped that said defendants would have paid the sums so due from them as requested.

But now so it is, may it please your honors, that the said defendants refuse to pay the sums from them respectively due as aforesaid, and pretend that the said vessel was not voluntarily stranded, and that the owners thereof and their insurers, are not entitled to demand and receive any contribution for the damage sustained by the stranding, and expense of getting off and repairing said vessel, the contrary whereof your orators charge to be true.

Pray *subpena* to the said, &c. [*the defendants*], and that they may be ordered and decreed to pay to your orators the sums so due from them respectively, or such other sums as may be found due to your orators, and to stand by, &c.

G. G. L., F. C. L., and C. W. L.,  
Counsel for Plaintiffs.

R. C.,  
C. G., T. C., and C. W. L., } Solicitors.

\* SECTION VIII.

\* 1932

*Bills by Creditors.*

28. *Bill by creditor against devisees in trust and executors of testator.*  
(*Modern English Form.*)

In Chancery.

Lord Chancellor.

Vice-Chancellor.

Between J. S. (on behalf of himself and all other  
the unsatisfied creditors of W. W., late, &c.,  
who shall come in and contribute to the expenses  
of this suit). . . . . Plaintiff,  
and

J. A., E. B.,<sup>1</sup> and W. B.,<sup>2</sup> . . . . . Defendants.

*Bill of Complaint.*

To, &c.

Humbly complaining, sheweth unto his Lordship, J. S., of, &c., the above-named plaintiff, on behalf, &c.

*Testator indebted to plaintiff.*] 1. That the said W. W., deceased, was on, &c., indebted to the plaintiff in the sum of two hundred and eighty pounds, upon the balance of accounts then settled by and between the plaintiff and the said W. W., deceased.

2. The said W. W., deceased, by his promissory note, dated, &c., two

<sup>1</sup> There were executors and devisees in trust of real estate for sale.

<sup>2</sup> W. B. was the *cestui que trust*. See Smith v. Andrews, 4 W. R. 353.

months after date, promised to pay the plaintiff the sum of two hundred and eighty pounds.

3. The said last-mentioned promissory note was given to secure the amount due to the plaintiff as mentioned in the first paragraph of this bill.

*Debt still owing to plaintiff.*] 4. The said sum of £——, &c., remained justly due and payable to the plaintiff from the said W. W., deceased, at the time of his decease.

*Will of testator.*] 5. The said W. W., deceased, made his will, dated, &c. (and which was duly executed and attested), and the said testator thereby devised all his real estate and personal estate to the defendants, J. A. and E. B., their heirs, executors, administrators, and assigns, upon trust to sell and collect and get in the same.

[The trust of the money arising from such sale being declared for the benefit of the defendant, W. B., if he should die before twenty-five years without leaving issue.

\* 1933 \**Death of testator.*] 6. The testator W. W. died in, &c., without having altered or revoked his said will, leaving the several persons named in his said will him surviving.

*Proof of will.*] 7. The said will of the testator was duly proved, &c., by the defendants J. A. and E. B., who thereby became, and now are, his sole legal personal representatives.

8. The testator was, at the time of his death, indebted to several persons other than the plaintiff.

9. The testator was, at the time of his death, possessed or entitled of or to personal estate of considerable value.

10. The testator also died seised or entitled of or to divers lands, messuages, and other real estate, situated in the county of Gloucester, and elsewhere in England.

*Executors have possessed themselves of testator's estate.*] 11. The defendants J. A. and E. B., have, since the death of the said testator, possessed themselves of the whole of the personal estate of the said testator, and as the devisees in trust or trustees of said will, they entered into, and are now in the possession or receipt of the rents and profits of his real estate, and they have received a large sum of money in respect of the real and personal estates of the testator.

*Applications.*] 12. The plaintiff has, by himself and his solicitor, made divers applications to the defendants, J. A. and E. B., and requested them to pay what is due to him for principal and interest in respect of his said claim, but they have refused so to do.

13. The said last-named defendants, however, allege that the personal estate of the said testator is insufficient to pay his debts, whereas the plaintiff insists, that if such allegation be true, yet that the personal estate of the testator, together with his real estate, is more than sufficient for payment of all his debts and funeral and testamentary expenses.

14. The said defendants also allege, that the real estate of the testator is subject to certain mortgages or incumbrances, and that they have been unable to sell the said real estate or any part thereof.

15. The defendant W. B. has attained the age of twenty-five years.

16. The defendant W. B. claims to be interested in the matters in question in this suit, and insists that he is a necessary party thereto.<sup>1</sup>

### *Prayer.*

The plaintiff prays as follows.

*An account of plaintiff's debt.*] 1. That an account may be taken of what is due to the plaintiff in respect of his said debt so due and owing to him from the said testator, W. W., as aforesaid, and of all \* other debts which were owing by the testator at the time of his \* 1934 death, and which still remain unpaid.

2. That the trusts of the said testator's will may be carried into execution by and under the direction and decree of this honorable Court.

*Account of personal estate.*] 3. That an account may be taken of the personal estate and effects of the testator received by the said defendants, J. A. and E. B., or either of them, or by any other person or persons, by their or either of their order, or for their or either of their use, and that the said estate may be applied in payment of the testator's debts and funeral expenses, and that the following further accounts and inquiries may be taken and made (that is to say).

*Account of real estate.*] 4. An inquiry of or to what real estate the testator was seised or entitled at the respective times of the date of his will and of his death.

5. An inquiry whether any and what incumbrances affect the said testator's real estate.

6. An account of the rents and profits of the said testator's real estate received by the defendants J. A. and E. B., or either of them, or by any person by their or either of their order, or for their or either of their use.

7. That the real estate of the said testator, or a sufficient part thereof, may be sold, and that the rents and produce thereof may be applied in payment of the testator's debts.

*That defendants may be restrained from receiving the assets.*] 8. That the defendants J. A. and E. B. may, if necessary, be restrained by the injunction of this honorable Court, from retaining, receiving, or collecting any of the moneys, debts, or other outstanding personal estate of the testator and from receiving the rents and profits of the real estate of the testator, and that some proper person may be appointed to receive all the outstanding personal estate and effects of the testator, and to collect and get in the debts owing to him.<sup>1</sup>

<sup>1</sup> The allegations in this bill, except those which relate to the debt of the plaintiff, can be adapted to the case of a *legatee*. In an ordinary *creditor's* suit, the decree does not go further than to direct payment of the testator's debts. As to Federal jurisdiction, see *Borer v. Chapman*, 119 U. S. 587.

<sup>1</sup> A voluntary covenant for payment of a

sum of money is a sufficient debt to support a creditor's suit. *Watson v. Parker*, 6 Beav. 283; see also *Lomas v. Wright*, 2 My. & K. 769; *Clough v. Lambert*, 10 Sim. 174; *Tufnell v. Constable*, 7 Adol. & E. 798.

*Form of Advertisement for Creditors.* — Pursuant to a decree of, &c., made in a cause *J. B. & others v. L. H. & others*, the creditors

\* 1935 \* 29. *Creditors' bill against a corporation and its stockholders, stating the grounds on which they are liable under the Statutes of Massachusetts.*<sup>1</sup>

S——, ss.

To the Honorable, the Justices of the Supreme Judicial Court, next to be holden at Boston, within and for the County of Suffolk, on the first Tuesday of April next.

Humbly complaining, show the plaintiffs, the Essex Company, a corporation duly established under the laws of this Commonwealth, having its place of business at L., in the county of E., on behalf of themselves and all the other unsatisfied creditors of the defendant corporation hereinafter named, who shall come in and contribute to the expenses of this suit, that by an act of the legislature of this Commonwealth, approved the twenty-sixth day of March, in the year eighteen hundred and fifty-two, J. W. E., and others, with their associates, were authorized to organize a corporation by the name of the Lawrence Machine Shop, for the purpose of manufacturing machinery in said L., with a capital stock not exceeding seven hundred and fifty thousand dollars; that thereupon on the — day of —, under and by virtue of said Act, the said Lawrence Machine Shop was duly organized, and then became and was a manufacturing corporation under the laws of this Commonwealth, having its works established at L. aforesaid.

And the plaintiffs further show, that the capital stock of said corporation was fixed and limited by said corporation at seven hundred and fifty thousand dollars; and that on the twenty-seventh day of January, in the year eighteen hundred and fifty-three, and before the whole amount of the capital stock fixed and limited by said corporation had been fully paid in, and before any certificate thereof had been made and recorded as prescribed by law, the said Lawrence Machine Shop, by G. McK., its treasurer, duly authorized thereto, made and delivered to the plaintiffs three several promissory notes in writing, dated the said twenty-seventh day of January, one for the sum of fifty thousand dollars, the other two for fifteen thousand dollars each, and thereby, for value received, promised the plaintiffs to pay to them or their order the amount of said notes, to wit, eighty thousand dollars, on the fifteenth day of January, in the year eighteen hundred and fifty-eight, with interest from the fifteenth day of January, of the year eighteen hundred and fifty-three, copies of which notes, with the indorsements thereon, are set out in the copy of judgment hereto annexed.

And the plaintiffs further show, that at the time the said Lawrence Machine Shop made and delivered said notes to the plaintiffs, and from

and legatees of E. M., of —, in the county of —, deceased, are to come in and prove their respective debts, and claim their respective legacies before F. I., or Master of said Court, at his office, in, &c., on or before the — day of — next, or, in default thereof,

they will be excluded the benefit of the said decree.

<sup>1</sup> See Stat. Mass. 1862, c. 218; *Essex Co. v. Lawrence Machine Shop*, 10 Allen, 352; *Erickson v. Nesmith*, 46 N. H. 371.

the time of its incorporation and organization until the twenty-first day of February, in the year eighteen hundred and fifty-seven, the said \* Lawrence Machine Shop had not given notice annually as \* 1936 required by the laws of this Commonwealth, in some newspaper printed in the county where the works of said corporation were established, to wit, the county of E., or in any newspaper printed in any other county, of the amount of all assessments voted by the corporation and actually paid in; nor had it given notice in any newspaper of the amount of all existing debts due from said corporation.

And the plaintiffs further show, that from the time of the incorporation and organization of the said Lawrence Machine Shop to the time said corporation made and delivered said notes to the plaintiffs, and for a long time thereafter, the capital stock fixed and limited by said corporation as aforesaid, had not been fully paid in; nor has there, from the time of its organization to the present time, been any certificate of the payment of said capital stock made and recorded by said corporation as by law provided.

And the plaintiffs further show that on, to wit, the fourth day of August, in the year eighteen hundred and sixty-two, they commenced a suit against the said Lawrence Machine Shop upon the aforesaid notes, returnable to the — Court, then next to be holden at N., within and for the said county of E., on the first Monday of September, in the year eighteen hundred and sixty-two, and duly entered said suit in said Court, and there prosecuted the same to judgment. And at said term of the said Court, on, to wit, the twenty-first day of October, in the year eighteen hundred and sixty-two, by consideration of the Justice of said — Court, judgment was rendered in said suit against said Lawrence Machine Shop in favor of the plaintiffs for the sum of thirty-seven thousand seven hundred and forty-seven dollars and sixty-two cents debt, and fifteen dollars and eighty-nine cents costs of suit, and execution was thereupon issued by said — Court, on, to wit, the twenty-fifth day of said October, against said Lawrence Machine Shop in favor of the plaintiffs for the said sum of thirty-seven thousand seven hundred and forty-seven dollars and sixty-two cents debt, and fifteen dollars and eighty-nine cents costs of suit; copies of which judgment, execution, and officer's return upon said execution are hereto annexed.

And the plaintiffs further show, that on, to wit, the said twenty-fifth day of October, A. D. 1862, the day of issuing said execution, they placed for collection said execution in the hands of one A. F. N., a deputy sheriff, qualified to collect, serve, and return said execution. And the said deputy sheriff, on, to wit, the third day of November, A. D. 1862, made demand upon the said Lawrence Machine Shop for the payment of the amount due to the plaintiffs; and for which judgment and execution had been rendered and issued in said suit as aforesaid.

And the plaintiffs show that the Lawrence Machine Shop did neglect, for the space of thirty days after said demand by said deputy sheriff holding said execution, to exhibit to said deputy sheriff real or personal \* estate belonging to said corporation, subject to be \* 1937 taken on execution, sufficient to satisfy said execution or any

part thereof. And the said corporation has never exhibited to said deputy sheriff any estate, real or personal, from which he might satisfy said execution in whole or in part; and the said corporation has ever since neglected and refused to pay the same or any part thereof; and the said deputy sheriff duly returned said execution into the clerk's office of said — Court, at S., in said county of E., in no part satisfied; and there is now due to the plaintiffs upon said judgment, rendered upon said notes, the said sum of thirty-seven thousand seven hundred and forty-seven dollars and sixty-two cents debt, and fifteen dollars and eighty-nine cents costs of suit, making in all thirty-seven thousand seven hundred and sixty-three dollars and fifty-one cents, with interest from the said twenty-first day of October, A. D. 1862, the day of the date of said judgment.

And the plaintiffs further show that at the time when said judgment debt was contracted, on, to wit, the twenty-seventh day of January, in the year eighteen hundred and fifty-three, the day of the date of said notes, and during the time from and after the said twenty-seventh day of January, A. D. 1853, and before the capital stock of said corporation, fixed and limited as aforesaid, was fully paid in, and before any certificate that said capital stock had been paid in, was made and recorded, as by law required, and from and after the said twenty-seventh day of January, A. D. 1853, and before any notice of the assessments, voted by said corporation and actually paid in, had been given, in any newspaper printed in said county of E., or printed in any other county; and from and after said twenty-seventh day of January, A. D. 1853, and before any notice of the amount of all existing debts due from said corporation had been given in any such newspaper as by law required, and at the time when your orators commenced their suit aforesaid against the said Lawrence Machine Shop, and in which judgment aforesaid was rendered, the following named persons became, and were, stockholders in the said Lawrence Machine Shop, each holding stock therein of the amount and number of shares set against their respective names: —

T. A., of L., county of M., holder of — shares, par value \$—

E. B., of B., county of S., holder of — shares, par value \$—

&c., &c.

Wherefore the plaintiffs, in behalf of themselves and the aforesaid other creditors of the said Lawrence Machine Shop, bring the foregoing bill against said Lawrence Machine Shop, and the aforesaid stockholders therein, and pray that the aforesaid stockholders may be ordered and decreed to pay to the plaintiffs the amount due them as aforesaid, as fixed and determined by the judgment aforesaid, with interest from the date of said judgment, and to pay such other creditors of the said corporation as may become parties to this bill such sums as may be found due to said creditors; and that the amount of the debt due as  
 \*1938 \*aforesaid to the plaintiffs from said Lawrence Machine Shop, and such as may be found due to such other creditors as may become parties hereto, may be assessed upon said stockholders as Law and Equity may require.

And that the plaintiffs may have such orders, decrees, and process



as may be necessary to enforce the payment of such sums as may be assessed upon said stockholders, and may have such further and other relief in the premises as the nature and circumstances of the case may require and as shall seem meet unto this honorable Court ;

May it please your honors to grant unto the plaintiffs a writ of *subpoena*, to be directed to the said Lawrence Machine Shop, and the said stockholders in this bill named, thereby commanding them, at a certain day, and under certain penalties therein expressed, personally to appear before this honorable Court, and then and there full, true, direct, and perfect answers make to all and singular the premises : and further, to stand to, perform, and abide such further orders, directions, and decrees therein as to this honorable Court shall seem meet.

The ESSEX COMPANY, *by its Treasurer,*

C. S. S.

D. S., Jun.

J. J. S.

*Solicitors and of Counsel.*

30. *Bill by a creditor against a foreign debtor, being an insurance company, and their agent having property in his hands within the State, to compel the application, in payment of the debt, of such property, not being of a nature to be attached at Law under the Statutes of Massachusetts.*<sup>1</sup>

The bill of complaint of D. S., of N., in the county of E., plaintiff, against the Columbia Insurance Company of C., in the State of S. C., and H. E., of B., in the county of S., and State of Massachusetts, defendants.

The plaintiff humbly complaining shows unto your honors, that the Columbia Insurance Company of C., in the State of S. C., is a foreign Insurance Company, established by the laws of the State of S. C., and that the said company, at and prior to date of the policies hereinafter mentioned, transacted, and ever since has transacted in this Commonwealth the business of an Insurance Company under and by virtue of the laws of this Commonwealth in that behalf made, and that at the periods and during all the time aforesaid, H. E., of B., in the county of S., was and still is the general agent of the said company for the State of Massachusetts, appointed by said company as such, in pursuance of the statute in that behalf made.

\*The plaintiff further shows, that on the nineteenth day of \*1939 September, A. D. 1854, the said Columbia Insurance Company by their policy of insurance, duly executed and issued to the plaintiff on said day at B. aforesaid, caused him to be insured against the perils of the sea \$—— on the outfits and \$—— on catchings on board the schooner A., at and from the coast of L., commencing the risk on the 9th day of August, 1854. at noon, on a fishing cruise, as will more fully appear by a copy of said policy of insurance hereunto annexed, marked A., which the plaintiff prays may be taken as a part of his bill.

<sup>1</sup> Silloway v. Columbia Ins. Co., 8 Gray, 199.

And the plaintiff further shows, that he is informed and believes, and therefore avers, that within the period named, on the twenty-first day of August, A. D. 1854, and while said vessel was on the fishing cruise mentioned in said policy, there happened by reason of the perils insured against in said policy to the plaintiff, a general average loss on said outfits and catchings, to the amount of \$—, and a partial loss on the same to the amount of \$—, and that due notice and proof of said loss were made without delay by the plaintiff to said Insurance Company, namely on the ninth day of October, A. D. 1854;—and thereupon it became and was the duty of the said Insurance Company to pay the plaintiff the amount of said loss in sixty days from said notice and proof of loss; but they have never paid the same nor any part thereof, except the sum of \$—, although sixty days have more than elapsed. [*The bill goes on to state another policy of insurance and loss under it, and neglect by said company to pay, and proceeds as follows.*]

And the plaintiff further shows, that the said Columbia Insurance Company has not neglected or refused to pay the claims of the plaintiff as aforesaid, by reason of any denial of the validity of the same, for on the contrary, the plaintiff, upon his personal knowledge, avers that said Insurance Company admits the justness and validity of said claims.

And so the plaintiff avers, that at and before the filing of this bill of complaint, and at and before the issuing of the writ hereinafter mentioned, he was, and now is, a creditor of the said Columbia Insurance Company to a very large amount; namely, the sum of seven thousand dollars.

And the plaintiff further shows, that heretofore, to wit, on the twentieth day of January, A. D. 1855, he commenced an action at Law against the said Columbia Insurance Company to recover the amounts due him on the policies of insurance aforesaid, at the next May term of our Supreme Judicial Court for the county of E., and that on the same day he delivered the writ in said action to a proper officer for service, with directions to attach the property of said Insurance Company if any such could be found, and the said officer has returned on

said writ, that after diligent search he could find no property  
\* 1940 of the \*said Insurance Company which was by law attachable,  
as will more fully appear from a copy of said writ with the return thereon hereunto annexed, and to which the plaintiff craves leave to refer as part of his bill.

And the plaintiff further shows, that during a long period previous to the commencement of said action at Law and the filing of this bill of complaint, he has made diligent inquiries to ascertain whether the said Columbia Insurance Company had or has any property within this Commonwealth which can be come at to be attached or taken on execution, and he has never ascertained or discovered that there was any such property, but is informed and believes that there is not, and upon his information and belief, he avers, that at and before the commencement of his said suit at Law, and the filing of this bill of complaint, there was no property of said Columbia Insurance Company within this

Commonwealth which could be come at to be attached or taken on execution.

And the plaintiff further shows, that he is informed and believes, and therefore avers, that there is a large amount of valuable property of the said Columbia Insurance Company now within this Commonwealth in the hands and possession of the said H. E., the general agent of the said company as aforesaid, but which cannot be come at to be attached or taken on execution in a suit at Law against the said Insurance Company; and that said property consists chiefly, if not wholly, of promissory notes which the said H. E. now holds, as the agent of the said Insurance Company, and which have been given in payment for the premiums on policies heretofore issued by the said Insurance Company within this Commonwealth, and that a very large sum of money is due to the said company, and is collectible on said notes, and that the plaintiff is informed and believes that said sum exceeds the sum of fifty thousand dollars, but the plaintiff is unable to state more definitely the amount of said notes, or to give a fuller description of the same, because he has had no opportunity to see said notes, and has been unable to procure a list of the same, although he has requested H. E. to furnish him with one.

And the plaintiff further shows, that the said H. E. is liable at any time to pass said notes out of his own hands and control into the control and possession of other agents and officers of said Insurance Company not residing within this Commonwealth, and beyond the reach of the process and jurisdiction of this honorable Court.

And the plaintiff further shows, that in justice and equity, and especially by virtue of the 206th Chapter of the Acts of 1851, entitled "An act to provide for further remedy for creditors," the plaintiff is entitled to have the property of the Columbia Insurance Company aforesaid now in the hands of the said H. E. as aforesaid applied to the payment of the debt now due and payable from the said Insurance \* Company to him as aforesaid, and that he is entitled to \* 1941 the aid of this honorable Court as a Court of Equity in that behalf.

Wherefore the plaintiff prays that the said H. E. may be enjoined from passing the said property of the Columbia Insurance Company now in his possession, into the possession of said Insurance Company, or of any agent or officer thereof, without the order and direction of this honorable Court, and that the said H. E. may discover under oath what promissory notes and other property of the said Insurance Company may now be in his possession or under his control, and that he may be required to deliver up the same into the custody of this honorable Court, and that the amount of the debts due from the said Insurance Company to the plaintiff on said policies of insurance may be fixed and determined, and that so much of the property of said Insurance Company now in the hands of the said H. E. as may be necessary for that purpose may be applied for the payment of the debt due to the plaintiff from said Insurance Company as aforesaid, and to

grant the plaintiff such other and further relief as to justice and equity may appertain.

To this end may it please your honors to grant unto the plaintiff not only your writ of injunction to be directed to the said H. E., and said company, restraining him from putting away said promissory notes and other property, and directing him to place the same in the custody of such person or persons as your honors may appoint, but also, &c. [*Prayer for subpoena against said H. E. and the Columbia Insurance Company.*]

(*Jurat.*)

D. S.

## SECTION IX.

### *Bill respecting the Excessive Use of a Right.*

31. *Bill for an account and injunction, where a trespass had been committed, by exceeding a limited right to enter and take stone from a quarry, such trespass being a destruction of the inheritance.*

To, &c.

The plaintiff A. B., of, &c. That the plaintiff now is, and for several years past has been, seised in fee-simple of and in certain lands and hereditaments, situate at C., in the county of D.; and in the said estate, at a certain place called E., there is, and for a considerable time past has been, a stone quarry, whence stone, for various purposes, of considerable value, has from time to time been obtained; and that L. M., of, &c. (the defendant hereinafter named), is also seised in fee-  
 \* 1942 simple, of\* and in certain messuages, lands, and hereditaments, and among others, of and in a certain farm called N. Farm, now in his own occupation, adjoining and contiguous to the plaintiff's said estate at C. aforesaid, and also to the said stone quarry; and the said L. M., as owner or occupier of the said farm, called N. Farm, was and is entitled to enter into the said quarry at E. aforesaid, and take thence stone for building and other purposes, for that part of his estate called N. Farm aforesaid, but for no other part of his said estate; but the said L. M., notwithstanding his right was so limited as aforesaid, has taken a considerable quantity of stone from the said quarry, for the purpose of using it on other parts of the said estate. And the plaintiff further sheweth unto your honors, that the plaintiff has frequently of late, by himself and otherwise, applied to the said L. M., and requested him to account for so much stone as has been so taken and used or intended to be used, on any part of his said estate, other than N. Farm aforesaid, and to make to the plaintiff a reasonable satisfaction for the same, and to desist in future from taking any stone from the said quarry, except for N. Farm aforesaid, without the plaintiff's permission, which your orator hoped the said L. M. would have done. But now so it is, may it please your honors, the said L. M., &c., refuses to comply with such requests, and threatens and intends to get, take, and carry away great

quantities of stone from the said quarry, to be used upon other parts of his said estate as well as N. Farm aforesaid; and he pretends that he is entitled so to do, and that his said privilege extends to the whole of his said estate. Whereas the plaintiff charges, that such privilege is expressly limited and confined to N. Farm aforesaid, and that in case the said L. M. shall persist in his said intention, he will occasion irreparable damage and injury to the plaintiff and to his said estate. And if the said L. M. shall pretend that the said privilege extends to any other part of his said estate than N. Farm aforesaid, then that he may discover and set forth in what manner in particular he makes out the same. And that the said L. M. may make a full and true disclosure and discovery of and concerning the several matters aforesaid; and that he may also discover and set forth what quantity of stone has been taken from the said quarry, and used and applied by or for him otherwise than in and upon N. Farm aforesaid, and when the same and every part thereof was taken, and how used, applied, or disposed of, together with the value thereof, and of every part thereof. And that an account may be taken, by and under the decree and direction of this honorable Court, of all the stone taken from the said quarry by the said L. M., and used, or intended to be used, or disposed of by him otherwise than in and upon N. Farm aforesaid, and that the value thereof may be ascertained, and the said L. M. decreed to pay the same to the plaintiff. And that in the mean time the said L. M. and his agents and workmen, may be restrained, by the order and injunction \* of this honorable Court, from getting, taking, and carrying \* 1943 away any stone from the said quarry, except for building and other purposes in and upon N. Farm aforesaid. [*General relief.*] May it please, &c.

## SECTION X.

*Bills relating to Partnership Matters.*

32. *Bill by one partner against another in the business of carpenters and builders, for an account of partnership transactions, the defendant having entered into various speculations without the consent of the plaintiff, and charged the loss of such speculations to the firm. The defendant having also hindered the plaintiff from attending at the place of business, the plaintiff took other premises and carried on business in the partnership name. The bill also prays for an injunction to restrain the defendant from receiving the partnership moneys, and for a Receiver, and also for directions as to the future management of the business.*

Humbly complaining sheweth unto your honors the plaintiff H. B., of, &c., carpenter and builder, that in or about the month of, &c., the plaintiff agreed with W. P., of, &c., carpenter and builder, the defendant hereinafter named, to become a partner with him in his said trade and business, and thereupon a certain indenture of two parts bearing

date on the — day of, &c., was made and executed by and between the plaintiff and the said W. P., which among other things therein contained was as follows, viz. [*stating the deed*]. And the plaintiff further showeth that the said partnership trade and business was accordingly entered upon and carried on by the said W. P. and the plaintiff pursuant to the provisions of the said indenture, and the same hath ever since continued and now continues; and the plaintiff hath from time to time in all things duly conformed to the stipulations and agreements in the said indenture contained. And the plaintiff further showeth that the said W. P. has since the commencement of the said partnership been in the habit of receiving all large sums of money, and of drawing all checks and bills of exchange on the partnership account; but the said W. P. has not duly and regularly entered all such transactions on the partnership books of account, but has entered therein only a small part of such transactions, and has kept the plaintiff in ignorance thereto; and the said W. P. has drawn many bills and given many acceptances and notes in the name of the partnership firm, not in respect of the partnership concerns, but for his own private purposes. And the plaintiff further showeth that, notwithstanding the provision in the \* 1944 said partnership articles that the partnership \* accounts should be duly stated and made up on the — of — in each year, yet the said W. P. has not yet stated and made up the partnership accounts to the — day of — although he has been repeatedly applied to for that purpose. And the plaintiff further showeth that after the formation of the said partnership, the said W. P., without consulting or communicating with the plaintiff, took in his own name certain ground and premises in —, and also in —, and the said W. P. built thereon, and the carpenters' work to such respective buildings was done by the partnership workmen and from the partnership stock, but all other workmen were employed thereon by the said W. P. without any communication with the plaintiff. And the plaintiff further showeth that such several speculations having proved unprofitable, and a considerable loss having been incurred thereby, the said W. P. has lately pretended that all such speculations were entered into by him on partnership account, and that the plaintiff is to bear his proportion of the loss. And the plaintiff further showeth that in or about, &c., the said W. P. took a lease of premises in — in his own name, and the said W. P. proceeded to build a house thereon, and represented to the plaintiff that he was building it for Mr. R., and the carpenters' work was by the desire of the said W. P. at first entered in the partnership books to Mr. R.'s account: but the said W. P. afterwards informed the plaintiff that he was to build the house on his own account, and the carpenters' work was from thence considered as the private debt of the said W. P. And the plaintiff further showeth that the expense of building the said house, including the carpenters' work, amount to \$ —, and that the said W. P. afterwards sold the said house for \$ — only, and then insisted that it was a speculation on the partnership account, and that the plaintiff should bear his proportion of the loss. And the plaintiff further showeth that the said W. P., in the beginning of the year —,

applied to the father of the plaintiff for a loan of money, alleging the trade required more, and that the plaintiff had not a sufficient capital in the trade. And the plaintiff further sheweth that the plaintiff's father upon that occasion referred to the plaintiff, and being informed of the reasons which the plaintiff had to complain of the conduct of the said W. P., refused to advance any further sum of money, and thereupon differences and disputes arising between the said W. P. and the plaintiff, the said W. P. proposed terms for the dissolution of the partnership to which the plaintiff acceded, but the said W. P. afterwards changed his terms, and the plaintiff not being able to come to any agreement in that behalf with the said W. P., gave notice to the said W. P. that all treaty for a dissolution was at an end. And the plaintiff further sheweth that the plaintiff afterwards continued to give his attention to the partnership business as usual, although he was upon many occasions abused and insulted by the said W. P. And the plaintiff further sheweth

\* that on the — day of — the plaintiff was at the partner- \* 1945  
ship counting-house when a message came from Mr. — re-  
questing Messrs. P. and B. to send a man to his house to do some  
carpentering jobs, and the plaintiff thereupon directed one of their men  
to go accordingly; but the said W. P. overhearing what passed desired  
their foreman P. not to let the man go, and the plaintiff then inquiring  
of the said W. P. what he meant by such conduct, the said W. P. an-  
swered that he did not choose the man should go, and that the plaintiff  
had better go about his business and not come there, and that none of  
the men should do anything he ordered them to do, and the said W. P.  
added some terms of opprobrium and abuse of the plaintiff; and the  
said W. P. then ordered C., their clerk, to keep the books himself, and  
to lock up the safe in order that the plaintiff might not have access to  
them; and the plaintiff having a pass key to the lock of the safe door,  
and to other locks on the partnership premises, the said W. P. caused  
the locks to be changed. And the plaintiff further sheweth that being  
compelled by such conduct on the part of the said W. P. to absent him-  
self from the partnership business, the plaintiff forthwith took other  
premises in — in the name of the partnership firm for the purpose of  
carrying on business there on the joint account of the said W. P. and  
himself pursuant to the aforesaid articles of partnership; but the plain-  
tiff at the same time considering it to be desirable that a dissolution of  
the partnership should be effected, if it could be done upon fair and  
reasonable terms, the solicitors of the plaintiff, at his request, on or  
about, &c., wrote and sent a letter to the said W. P. in the words and  
figures or to the purport and effect following; that is to say, — “ Sir,  
in consequence,” &c.

And the plaintiff further sheweth, that the said W. P. hath taken no  
notice of the said letter, nor hath since in any manner communicated  
with the plaintiff, and the plaintiff hath from thence continued to carry  
on business in the partnership name and on the partnership account in  
the said new premises in —, but hath at all times been and is now  
willing and desirous to attend to the partnership business if requested or  
permitted so to do by the said W. P.

And the plaintiff humbly insists that the said W. P. ought to come to an account of the partnership dealings and transactions from the commencement thereof, and that the said W. P. ought to be restrained by the injunction of this honorable Court from receiving and collecting the partnership debts and moneys due or to accrue due; and that some proper person ought to be appointed by this honorable Court to receive and collect the same; and that proper directions ought to be given by this honorable Court for the conduct and management of the said partnership business in future for the joint and equal benefits of the said W.

P. and the plaintiff. To THE END. [*See form No. 37, p. 1884.*]

\* 1946 \* And that the said defendant may answer the premises and that an account may be taken of all and every the said copartnership dealings and transactions from the time of the commencement thereof; and also an account of the moneys received and paid by the plaintiff and the said defendant respectively in regard thereto, the plaintiff being ready and willing, and hereby offering to account for the partnership dealings and transactions which have been carried on by the plaintiff in the premises in — aforesaid; and that said defendant may be decreed to pay to the plaintiff what upon the taking of the said accounts shall appear to be due to him. And that in the mean time the said defendant W. P. may be restrained by the order and injunction of this honorable Court from collecting or receiving any partnership debts or other moneys, and that some proper person may be appointed to collect and receive the same; and that proper directions may be given for the conduct and management of the said partnership business in future, for the joint and equal benefit of the plaintiff and the said W. P. [*And for further relief, see form No. 38, p. 1885.*]

33. *Bill for a dissolution of a partnership between auctioneers, and for an injunction to restrain one of the defendants from collecting debts.*

To, &c.

Humbly complaining sheweth unto your honors, the plaintiff. P. C., of, &c., that in or about the month of —, the plaintiff entered into an agreement with C. B., of, &c., and C. F., of, &c., the defendants herein-after named, to form a partnership with them in the business of auctioneers and appraisers, which agreement was reduced into writing, and signed by the plaintiff and the said defendants, and was of the following purport and effect, viz. [*stating the same*], as in and by the said agreement, reference being thereto had, will appear. And the plaintiff further sheweth that the said copartnership business was entered upon, and hath ever since continued to be carried on by the plaintiff and the said defendants in pursuance of and under the aforesaid agreement, no articles or other instrument having ever been prepared and executed between them. And the plaintiff further sheweth that having much reason to be dissatisfied with the conduct of the said C. B., and being desirous, therefore, to dissolve the said partnership, the plaintiff, on or about —, caused a notice in writing, signed by the plaintiff, to be delivered to the said C. B. and C. F., as follows, viz.: “In conformity,” &c., &c., as in



and by such written notice, now in the custody or power of the said defendants, or one of them, when produced, will appear. And the plaintiff further sheweth that the said C. B. has from time to time, since the commencement of the said partnership, applied to his own use from the receipts and profits of the said business, very large sums of money, greatly exceeding \*the proportion thereof to which he \* 1947 was entitled, and in order to conceal the same, the said C. B., who has always had the management of the said copartnership books, has never once balanced the said books. And the plaintiff further sheweth that, having in the beginning of the year — discovered that the said C. B. was greatly indebted to the said copartnership, by reason of his application of the partnership moneys to his own use, the plaintiff, in order to form some check upon the conduct of the said C. B., requested that he would pay all copartnership moneys which he received in to his bankers, and would draw for such sums as he had occasion for; but the said C. B. has wholly disregarded such request, and has continued to apply the partnership moneys received by him, to his own use, without paying the same in to the bankers, and has also taken to his own use moneys received by the clerks, and has by such means greatly increased his debt to the partnership, without affording to the plaintiff and the said C. F. any adequate means of ascertaining the true state of his accounts. And the plaintiff further sheweth that he has, by himself and his agents, from time to time applied to the said C. B., and has requested him to come to a full and fair account in respect of the said copartnership transactions, with which just and reasonable requests the plaintiff well hoped that the said defendant would have complied, as in justice and equity he ought to have done. But now so it is, &c., the said defendant C. B. absolutely refuses so to do, and he at times pretends that he has not received and applied to his own use more than his due proportion of the partnership profits; whereas the plaintiff charges the contrary thereof to be truth, and so it would appear if the said C. B. would set forth a full and true account of all and every his receipts and payments in respect of the said partnership transactions, and of the gains and profits which have been made in each year since the commencement of the said partnership. And the plaintiff charges that the said C. B. has in fact received the sum of \$ — and upwards beyond his own proportion of the partnership profits, and that he is nevertheless proceeding to collect in the partnership debts and moneys, whereby the balance due from him will be increased to the great loss and injury of the plaintiff and the said C. F. And the plaintiff charges that the said C. B. ought therefore to be restrained by the order and injunction of this honorable Court from collecting and receiving any of the said partnership debts and moneys. And the plaintiff charges that the said C. F. refuses to join the plaintiff in this suit. All which actings, &c.

And that the said defendants may answer the premises; and that the said copartnership may be declared void, and that an account may be taken of all and every the said partnership's dealings and transactions from the time of the commencement thereof, and also an account of the moneys received and paid by the plaintiff and the said defend-

\* 1948 ants \* respectively in regard thereto; and that the said defendants may be decreed to pay to the plaintiff what, if anything, shall, upon the taking of the said accounts, appear to be due to him, the plaintiff being ready and willing, and hereby offering to pay to the defendants or either of them what, if anything, shall, upon the taking of the said accounts, appear to be due to them or either of them from the plaintiff; and that in the mean time the said defendant C. B. may be restrained by the order and injunction of this honorable Court, from collecting or receiving the partnership debts or other moneys. [*And for further relief, &c.*] May it please, &c.

*Pray subpoena against C. F., and  
Subpoena and injunction against C. B.*

34. *Prayer in a bill seeking an account of partnership dealings, Receiver and injunction.* [*Modern English Form.*]

1. That an account may be taken by and under the decree and direction of this honorable Court, of all the said partnership dealings and transactions between the plaintiff and the defendant, and that what shall appear thereon to be due from the defendant may be decreed to be paid by him.

2. That a proper person may be appointed to receive, collect, and get in all the outstanding debts and moneys due to or on account of the said partnership business or concern, and also to take possession of all the effects and property of or belonging to the said partnership.

3. That the defendant may be ordered to deliver up to such person all the effects and property of or belonging to the said partnership in his possession or power, and also all books of account, accounts, receipts, vouchers, and papers of or belonging to the said partnership; and that the defendant may be restrained, by the order and injunction of this honorable Court, from demanding, receiving, or obtaining possession of any debts, moneys, or property due or belonging to the said partnership; and also from in any manner intermeddling with the books, papers, bills, or accounts of the said partnership; and that the said effects and property of or belonging to the said partnership may be sold and converted into money by and under the direction of this honorable Court.

4. That out of the share of the defendant in the produce thereof, what shall be found due to the plaintiff in respect of the moneys of the partnership so improperly applied by the defendant as aforesaid, may be made good to the plaintiff.

5. That all such further directions as may be necessary may be given.<sup>1</sup>

<sup>1</sup> See form of order for the sale of partnership property, and for a Receiver, in *Wilson v. Greenwood*, 1 Swanst. 483. As to the joint and separate assets, in case of a bankruptcy or death of one of two partners, see *Butchart v. Dresser*, 4 De G. M. & G. 542; *Ridgway v.*

*Clare*, 19 Beav. 111. And as to appointing a Receiver at the instance of the solvent partner against the assignees of bankrupt partner, *Freeland v. Stansfeld*, 2 Sm. & G. 479; 1 Jan. N. S. 8.

- \* 35. *Prayer of a bill filed after a dissolution of partnership between ironmongers, the defendants having agreed to exonerate the plaintiffs from the payment of the debts, — the plaintiffs pray that an account may be taken of the debts due from the firm, and remaining unpaid, that the defendants may be declared answerable for the amount thereof, and that the plaintiffs may be declared to have a lien for the same on the partnership stock and premises, and if necessary for a sale thereof, in satisfaction for such debts; also, for an injunction to restrain the defendants from selling the partnership stock, &c., and that a covenant entered into by the plaintiffs, restraining them from carrying on the trade within forty miles, may be reformed, according to the agreement of the parties.* \* 1949

And that an account may be taken of all and every the debts and demands which were due from the plaintiffs and the said P. J. B. in their partnership firm of —, or in respect thereof at the time of executing the said indenture of the — day of —, and which have not been paid and satisfied by the said P. J. B. or the said other defendants, and that the said several defendants may be declared answerable for the amount of what shall be found due on such account. And that it may also be declared that the plaintiffs have a lien to the amount of what shall be found due on such account upon the partnership stock, premises, debts, and effects, which were assigned by the plaintiffs to the said P. J. B. in consideration of his engagement to exonerate the plaintiffs from the payment of such debts; and that, if necessary, the said partnership stock, premises, and effects may be sold and applied in satisfaction of such debts under the decree of this honorable Court, and that all proper directions may be given in that behalf. And that the defendants may in the mean time be restrained, by the injunction of this honorable Court, from selling, assigning, or disposing of the said partnership stock, premises, and effects, and that the said covenant in the said indenture of the — day of —, whereby the plaintiffs are restrained from engaging in or carrying on any part or branch of making or manufacturing iron under any modification whatsoever, or any articles or utensils made of iron, within forty statute miles of —, may be reformed according to the intent and agreement of the partners respecting the same as aforesaid. [*And for further relief.*]

- \* 36. *Bill by surviving partner, against the administrator, widow, and heirs of the deceased partner, claiming certain real estate which had been purchased with funds of the partnership, as partnership property.*<sup>1</sup> \* 1950

To the Judges of the Circuit Court of the United States for the District of Massachusetts.

M. K., of M., in the State of New Hampshire, and a citizen of said New Hampshire, stone-cutter, brings this his bill against T. G., of C.,

<sup>1</sup> Kelley v. Greenleaf, 3 Story, 93; see Dyer v. Clark, 5 Met. 562.

in the county of M. and Commonwealth of Massachusetts, merchant, the administrator of the goods and estate of O. H., late of said C., stone-cutter, and a citizen of Massachusetts, deceased; N. H., of said C., widow; H. O. H., and S. S. H., both minors, under the age of twenty-one years, residing with their mother, said N. H., at said C.; J. F., of M., in said county of M., gentleman; F. P., of B., in the county of S., and Commonwealth aforesaid, clerk; and E. H. D., of said C., merchant: all citizens of the said Commonwealth of Massachusetts.

And thereupon your orator complains and says, that on or about the twenty-second day of January, A. D. 1834, one O. H., then of said C., but now deceased, and your orator, entered into copartnership together, under the firm of H. & K., as stone-cutters, for the purpose of carrying on business as dealers and workers in hammered and other stone, for buildings and other purposes, on joint account, and upon an equal division of profits, and they then contributed the sum of five hundred dollars each, to form a capital stock to start with, and they continued to carry on business together, as such general partners, at said C., from said date up to the twenty-second day of December, A. D. 1841, when said partnership was dissolved by the death of said O. H., as herein-after stated; — that in the course of their partnership transactions and dealings, previously to the first day of January, A. D. 1839, your orator and said O. H., as such partners, became possessed of and owned divers copartnership property and assets, consisting of stone, tools, notes, accounts, five-eighth parts of a certain sloop or vessel, called the *Almira*, of C., a certain parcel of land situate on the easterly side of C. Square, in said C., bounded, &c. [*description and boundaries*], and a certain parcel of land situate in C. Street, in the city of B., bounded, &c. [*description and boundaries*], and your orator further shows, that both said parcels of land were purchased by your orator and said O. H., with their copartnership funds, and on account and for the use of the copartnership, and the same were originally and always intended by your orator and said O. H. to be held, enjoyed, and managed as part of their copartnership stock; and in the year 1837, your orator and said O. H., having then a large quantity of building granite stone on hand

belonging to the firm, concluded, upon consultation together, as

\* 1951 the most \* advantageous way of using said stone, for the benefit of the concern, to erect a granite stone building, for a store and offices, upon said land in C. Square, on the copartnership account, and out of the copartnership funds, and for the benefit of the concern; they accordingly, and in pursuance of said determination, did thereupon build said building on said land, out of and with their copartnership funds and property, intending the same to constitute a part of their joint copartnership stock and property, and have ever since held and enjoyed, and considered the same as part of their joint copartnership stock and property.

And your orator further shows, that on the first day of January, A. D. 1839, your orator and said O. H., upon taking an account of their copartnership stock and property, as it then was, being the original stock and all accumulations thereon, estimated and set down the same as fol-

lows, to wit: The said land and stone building on the easterly side of C. Square, at six thousand dollars; the said land in C. Street, at two thousand dollars; the said sloop Almira (or their interest therein), at one thousand dollars; stock and tools at their stone-yard, at twelve hundred dollars; cash on hand, including notes and accounts due them, at sixteen hundred dollars; two certain notes of one C. E., at two hundred and seventy-two dollars, — in all, the sum of twelve thousand and seventy-two dollars; and the same real and personal estate was then declared, in writing, by said O. H. and your orator, to be the copartnership stock and property of the concern of which said O. H. and your orator were equal owners, share and share alike.

And your orator further shows, that the said O. H. had, from the first, and continued until at or about the time of his death, to have the sole charge and management of all the financial affairs of the concern, receiving all the money, and making all the payments, keeping the books and accounts, and having charge of the papers of the firm, and the general care of all its property and concerns, except as to the stone and tools in the stone-yard, and the care and management of the work there, and the execution of the jobs and contracts there, which had been undertaken by the firm, to which department your orator gave his entire attention, from the commencement of the partnership until its dissolution; and on said first day of January, 1839, upon the occasion of the taking said account of their partnership property and affairs, and after declaring what their partnership stock consisted of, as above stated, and upon settling, each with the other, as to the moneys drawn out by each respectively, for their own use, up to said date, said O. H. undertook and agreed, in writing, under his hand and seal, with your orator, that he, said O. H., would, from his own means, and without impairing your orator's interest in said copartnership property above specified, pay and discharge all debts and demands, of every nature, then due and owing from said partnership, when the same became payable, and \* would save your \* 1952 orator harmless from all such debts and demands, excepting that any contracts for work and materials, or any other thing connected with the business of the firm, made in the year 1838, and to be performed after said first day of January, 1839, should be paid or discharged by the copartnership.

And your orator further shows, that from and after said first day of January, 1839, your orator and said O. H. continued their joint business as before, with their said capital stock, composed of and consisting in said real and personal estate above specified, and on or about the second day of February, 1840, being in want of the sum of \$1500, for their copartnership uses and purposes, they borrowed the same sum upon their copartnership account, from said J. F., upon a mortgage of their said land and building in C. Square, made to said J. F., as guardian of one N. F., a minor, to secure the joint and several note of your orator and said O. H., of that date, payable in three years, with interest semi-annually, and all the money so borrowed was received by said O. H., on account of the firm, in the same manner as all other funds arising from their copartnership business; and the whole semi-annual interest, which

became payable during said O. H.'s life, on said mortgage note, has been paid by him out of the copartnership funds, and charged in the company's books, as a debt of the concern. And your orator has been informed and believes, and therefore states the fact to be, that said J. F. has transferred and assigned said note and mortgage to said F. P., who now holds the same; but when said assignment was made, or for what consideration, or whether the same was absolute or conditional, your orator is not informed, and cannot now state.

And your orator further shows, that said O. H., as the managing partner of said firm of H. & K., between the said first day of January, 1839, and the twenty-second day of December, 1841, received and had on the said firm's account, and to their use, divers copartnership moneys, to the amount of \$48,400, and upwards, as near as your orator has been able to ascertain the same, and during the same time paid out, in payment of the copartnership debts and liabilities and for copartnership purposes, the sum of \$37,361.09, and no more, as near as your orator has been able to ascertain the same; but whether any part of said last-named sum, and if any, how much, was paid out by said O. H. to discharge debts due before January 1, 1839, which said O. H. was bound to discharge out of his own means, your orator is not now informed, and cannot now state with certainty, except as to two small debts, amounting together to \$65, which your orator has been obliged to pay since his decease. That during the same time, your orator received and drew out of the concern, for his own use, the sum of \$1422.98, and no more, the same being handed to him, at sundry times, by said O. H., and charged to your orator in the books, except the sum of \$266, which does not appear to be charged; and that the residue of said \* 1953 copartnership \* moneys, upwards of \$9600, so received by said O. H., remains due from and unaccounted for by him to the concern.

And your orator further shows, that the said O. H. died at said C., on the twenty-second day of December, 1841, intestate, leaving a widow, said N. H., and only two children and no issue of any deceased child surviving him, viz., said H. O. H. and said S. S. H., both minors, of tender years; that said T. G. was afterwards duly appointed the administrator of said O. H., deceased, and duly accepted, and took upon himself that trust.

And your orator further shows, that upon the death of said O. H., and the dissolution of the partnership between him and your orator consequent thereon, the joint debts, due from said firm to others, amounted to upwards of the sum of \$7400, as near as your orator has yet been able to ascertain, exclusive of the claim of your orator upon the firm; — that the copartnership assets at the same time consisted of certain stone and tools, then in the stone-yard or wharf occupied by them at C., estimated and valued at \$1300; five-eighth parts of the sloop *Almira*, estimated at \$937  $\frac{5}{100}$ ; divers accounts and notes; and said real estate in C. Square and in C. Street; and said balance of copartnership moneys in the hands of said O. H., as above stated; — that the above estimates and valuations were made upon and affixed to said stone and tools, and

said five-eighth parts of said sloop *Almira*, respectively, by said T. G., as administrator of said O. H., soon after his appointment, and your orator; — and the same were to be and have been disposed of and converted into cash by your orator at the above rates, with the concurrence of said T. G.; — that your orator, as surviving partner, proceeded without delay, and with all fidelity, to realize the cash from said stone and tools, and said interest in said sloop, and to collect said notes and accounts, so far as he could, and has realized from said sources the sum of \$5480<sup>84</sup>/<sub>100</sub>, and no more; — and at the same time your orator has paid, and discharged, and liquidated, since the death of said O. H., copartnership debts of said late firm to the amount of \$5729<sup>16</sup>/<sub>100</sub>, among which were some debts, amounting together to \$65, that should have been paid by said O. H. exclusively, according to his said undertaking of January 1, 1839.

And your orator further shows, that there are still divers debts due from, and demands against, said late copartnership, which he has not been able to discharge, out of said partnership property or otherwise; and there is also a large balance justly due and payable to him, out of said partnership property, on a just settlement of the copartnership concerns, for which said copartnership property is and should be holden to him, before the administrator, or heirs, or widow of said O. H., in justice and equity ought to have any portion thereof; but inasmuch as the title to one undivided half of said copartnership assets in real estate is now, by the strict rules of the Common Law and the form of the conveyances of the said two parcels of land to your orator and said O. H., \*in the said two children of said H., who are his heirs-at-law, \* 1954 and the same is also at Law, subject to his said widow's right of dower therein, your orator cannot, without the aid of a Court of Equity, to wind up the partnership concerns and distribute the assets, as to justice and equity shall appertain, make said partnership property, now existing in the shape of real estate, available for the payment of the said partnership debts now outstanding, nor the payment of your orator's own just claims thereon. Neither has your orator received anything from the private estate of said O. H. since his decease; nor can he collect anything therefrom, as the same is supposed, by his said administrator (as your orator is informed and believes), to be insolvent.

And your orator further shows, that said O. H., in or about the month of April, 1839, without any concert with your orator, and without his previous knowledge, and (as your orator supposed when he learnt the fact) on his, said H.'s own private account, purchased a lot of land in said C., situate, &c. [*description and boundaries*], and took the conveyance thereof in his, said O. H.'s, own name; and afterwards erected a dwelling-house thereon, which he occupied himself, down to the time of his death. But instead of paying for the same out of his own private means, your orator has since discovered that said O. H., wrongfully, and without the knowledge of your orator, and in fraud of your orator, applied the copartnership funds of the firm to the whole payment for said land, and the whole cost of building of said house, concealing the same from your orator. That your orator discovered said misappropriation and misuse of the partnership funds, by said O. H., during his last

sickness, and shortly before his death; and your orator has also been informed and believes, and accordingly states the fact to be, that said O. H., shortly before his death, stated and declared, that said dwelling-house and premises belonged in truth as much to your orator as to himself; that it was built out of the firm's money, or words to that effect; — and your orator, upon taking the papers and documents belonging to the firm into his possession, after said O. H.'s death, found the deed of said land, on which said dwelling-house was built, filed with the deeds of said land in C. Square and in C. Street, and the other papers and documents of the firm, in the desk where they had been placed and were kept by said O. H.

And your orator further shows, that he has been informed, and believes, and accordingly states, that said E. H. D. claims to hold a mortgage upon said dwelling-house and premises near B. Street, made to his father, E. D., deceased, whose administrator he is, by said O. H., to secure the payment of a private debt of said O. H.'s to said E. D., of one thousand dollars; but when said mortgage was made, and for what consideration, and any other particulars respecting the same, and whether said E. D. had, at the time he took said mortgage, any notice or knowledge that said land was paid for, and said house built from  
 \* 1955 \* the copartnership funds of said H. & K., so wrongfully used and misapplied by said O. H., in fraud of your orator, your orator does not know, and cannot state with certainty; but prays that said E. H. D. may, in his answer, make full discovery and disclosure thereof, and concerning the same.

And your orator well hoped that no dispute or difficulty would have occurred respecting the settlement of the said copartnership concerns, but that said real estate on C. Square, and said land in C. Street, as well as said dwelling-house and land near B. Street, might all have been sold and converted into cash, and the proceeds taken by your orator, as surviving partner of said firm, as part of the copartnership property, so that your orator could have paid all the copartnership debts, and have liquidated and adjusted and wound up all the copartnership concerns, without invoking the aid of this honorable Court. But, by the form of the conveyances to said late firm of H. & K., of the said land on C. Square, and said land in C. Street, the legal title to one undivided half thereof was, during said O. H.'s life, vested in him in fee at Law, and upon his death the same descended, subject to his widow's dower therein, to his said two children; although, in equity and in truth, the said O. H., during his lifetime, held the said undivided half of said lands, as trustee for the firm, and the same descended, subject to said trusts, to his heirs; and the legal title to the said dwelling-house and land near B. Street was wholly vested in said O. H. during his lifetime, and the same, upon his death, descended at Law, subject to his widow's dower, to his said heirs, although the same in equity and good conscience belonged to the said firm, and said O. H. was in truth but the mere trustee thereof for the firm. And the said H. O. H. and S. S. H., the children and heirs-at-law of said O. H., deceased, are both minors of tender years, and incapable of conveying the title to said real estate to your orator, as surviving



partner of said firm, for the purpose of enabling him to wind up, adjust, liquidate, and settle the copartnership concerns, if they were disposed so to do.

And your orator further shows that the said T. G., the administrator of said O. H., claims, or has claimed, that the one undivided half of the said estate on C. Square, and of said land in C. Street, and the whole of said dwelling-house and land near B. Street in C., are the private estate of said O. H., and threatens, or has threatened, to sell the same for the payment of the private debts of said O. H., to the exclusion of the paramount rights of your orator and the creditors of the firm, to have the same treated and applied as partnership assets. And said N. H. claims that, as the widow of said O. H., deceased, she is entitled to dower in all the said real estate whereof her husband was seised at Law during his life; and threatens to take measures to have the same set out to her. And your orator has reason to apprehend that said T. G., as such administrator, \* will proceed to apply to the Probate Court for \* 1956 the county of M., for license to sell said real estate for the payment of said O. H.'s private debts, and will apply the proceeds of such sales to that purpose; and that said N. H. will proceed to seek to have dower set out to her in said estates; and that said real property, so in justice and equity the copartnership property and assets of said late firm of H. & K., will be diverted from your orator and the creditors of said firm.

To the end, therefore, the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make, to such of the several interrogatories hereinafter numbered and set forth, as by the note hereinafter written they are respectfully required to answer, that is to say, —

1. Whether, &c.
2. Whether, &c.
3. Whether, &c.

And so on, 45 interrogatories.

And the said land and building in C. Square, and said land in C. Street, and also said land and dwelling-house near B. Street, may be adjudged and decreed to be partnership property and assets of the said late firm of H. & K., and that the same may be ordered to be sold, under the direction of this honorable Court, for the purpose of winding up the concern, and that a receiver of all the copartnership assets and property now unadministered, by your orator, may be appointed, and that proper and just accounts may be taken between the parties, touching the matters in question, and that said O. H.'s estate may be charged with a fair rent for said dwelling-house, during the time it was in his occupation, and for such further time, if any, as may seem meet to your honors, and that all the affairs and concerns of said late firm of H. & K. may be wound up, adjusted, and closed, under the direction of this honorable Court, and after payment of all the debts of the con-

cern, and the partnership balance which may be found due to your orator out of the assets, that the surplus may be divided between your orator and the administrator or heirs of said O. H., according to their respective rights therein, and as to justice and equity may appertain; and that, in the mean time, said administrator, widow, and heirs of said O. H. may be restrained and enjoined from proceeding to take any measures to sell said real property or interest therein, or to have any dower set out therein to the said widow, or from any proceeding touching said real estate, or any of it, adverse to the interests and claims of your orator, until the relative rights and interests therein, of your orator and the said defendants, may be settled and determined; and that \* 1957 your \* orator may have such further and other relief in the premises as the nature of his case shall require, and as to your honors shall seem meet.

May it please your honors to grant unto your orator not only a writ of injunction, firmly restraining and enjoining said T. G., the administrator, and said H. O. H. and S. S. H., the heirs, and said N. H., the widow of said O. H., deceased, from taking any measures to sell said real estate, or any part thereof, or any interest therein, or to have any dower set out therein, or in any part thereof, until the relative rights and interests of your orator and said defendants in said real estate, may be settled and determined; but also, &c. [*Pray subpoena directed to said T. G., N. H., H. O. H., S. S. H., J. F., F. P., and E. H. D.*]

M. K.

G. & E., *Solicitors.*

The defendants T. G., N. H., H. O. H., and S. S. H. are required to answer all the interrogatories numbered 1 to 42, both inclusive.

The defendant N. H. is required also to answer the interrogatories numbered respectively 43 and 45.

The defendant T. G. is required also to answer the interrogatory numbered 44.

The defendant J. F. is required to answer the interrogatories numbered respectively 18 and 19.

The defendant F. P. is required to answer the interrogatory numbered 19.

The defendant E. H. D. is required to answer the interrogatory numbered 40.

## SECTION XI.

### *Relating to an Agent.*

#### 37. *Bill against an agent for mismanagement.*

To the Judges of the Circuit Court of the United States for the District of Massachusetts.

W. D., the younger, of the city, county, and State of New York, merchant, and a citizen of said State, brings this, his bill, against N. W.

the younger, and A. S., merchants and copartners doing business in B., in the State of Massachusetts, under the firm of N. W., Junior, & Company, and citizens of the State of Massachusetts.

And thereupon your orator complains and says, that, in the month of January, A. D. 1856, he was the owner of a certain ship or vessel called \* the Mastiff, then lying in the port of B., bound on a \*1958 voyage to S. F., in the State of California, and that being desirous to procure a cargo of goods and merchandise to be carried to said S. F., in said vessel on freight, he applied to said W. & S. who were engaged in that line of business, to obtain a cargo for said vessel on freight, and, as a compensation for their services in so doing, agreed to pay them a commission of five per centum on the amount of the freight and primage of such goods and merchandise as they should procure to be shipped on board of the said ship, in consideration of which they agreed to act as his agents in the premises, and to make use of their knowledge, skill, and ability to procure a full cargo for said vessel on freight, — and that accordingly the lading and procurement of freight were intrusted to them, and in the said month of January, and the ensuing months of February and March, they did procure a cargo for said vessel, and in the month of March she set sail and departed on her voyage for said S. F.

That on or about the seventeenth day of said March, said W. & S. sent to your orator a freight list, or statement of the amount of merchandise laden on board of the said vessel, and of the rates of freight thereof, and of the sums of money to be earned and paid on the carriage and delivery thereof at said port of S. F. (which said freight list your orator prays leave to file in Court as a part of this bill); by which it appears that all the merchandise laden on board of the said ship was shipped at specific rates of freight therein set down, and that the total amount of freight, including primage, was the sum of twenty thousand and one dollars and twenty cents, upon which sum the said W. & S. claimed of your orator, and he paid to them a commission of five per centum, amounting to the sum of one thousand and five dollars and six cents, together with other charges for advertising and so forth, as by their bill herewith also filed, in the full belief, and relying on the assurance of the said W. & S. made by sending him the said freight list and otherwise, that the merchandise therein mentioned had been actually laden on board of the said vessel, to be carried and delivered at and for the rates of freight therein specified.

That the said ship was consigned to certain persons doing business at said S. F., under the firm of C. & D., who, upon the arrival of said vessel in the month of —, 1856, attended to the unlading and discharge of the cargo, the collection of the freight and the remittance thereof to your orator. That upon such discharge and delivery, it appeared that fifty-seven  $\frac{1}{2}$  tons of pig-iron, which in the said freight list were specified as shipped at the rate of ten dollars per ton, and the freight of which was therein stated to amount to five hundred and seventy-seven  $\frac{1}{8}$  dollars, and one hundred and thirty-three nests tubs, two hundred nests tubs, and seventy-five dozen pails, which in said

freight list were specified as shipped at and for the freight or  
 \* 1959 compensation \* of five hundred and ten dollars, were not shipped  
 at such rates of freight, but the rate of freight specified therefor  
 in the bills of lading thereof (which were not signed by the master of  
 said ship, but by the said W. & S., who assumed to act as his agents  
 in that behalf without his knowledge or consent) was "*one half net  
 profits over costs and charges*;" that the said iron, tubs, and pails, as  
 your orator is informed and alleges, could not be sold at any profit, and  
 that the said C. & D. did not collect, and your orator has not received,  
 any freight or compensation for the carriage and delivery thereof at  
 said S. F.

That, upon receiving information from the said C. & D. of the fact  
 that said iron, tubs, and pails were shipped on half profits instead of  
 the rates of freight stated in said freight list, your orator immediately  
 advised the said W. & S., that he held them responsible for the amount  
 of freight at which they had represented that the same were shipped,  
 and upon which they had charged and been paid their full commission,  
 and requested payment thereof, which they refused to make.

That the commission, agency, and trust, for which your orator retained  
 said W. & S., was to procure a cargo for said vessel to be carried and  
 delivered on payment of freight in money at specified rates, and not  
 upon half profits; that the said W. & S. represented to your orator  
 that they had obtained and shipped a cargo, upon the delivery of which  
 your orator would be entitled to receive the sums of money as freight  
 therefor specified in the said freight list; that said W. & S. demanded  
 of your orator a commission on the amount thereof, as so shipped, and  
 that your orator paid them said commission, in the full belief and re-  
 lying upon their assurance, contained in said freight list, that the va-  
 rious articles therein mentioned were shipped at the rates of freight  
 therein specified, and that upon the safe delivery thereof your orator  
 would be entitled to receive the same in money.

That the said iron, tubs, and pails were safely carried to S. F. and  
 delivered to the consignees thereof, and that upon such delivery your  
 orator had earned and was entitled to be paid for such service the rates  
 of freight and sums of money specified in the said freight list, the same  
 being the usual and current rates of freight, upon the amounts of which,  
 as such, the said W. & S. charged their commissions as aforesaid;—  
 that by reason of their undertaking to carry and deliver the same upon  
 half profits instead of on freight, your orator has lost the sums of  
 money to which he should have been entitled and to which the said  
 W. & S. represented that he would be entitled on the delivery thereof,  
 and has not received and is not entitled to claim, by reason of their  
 said doings, any compensation from the owners or consignees of the  
 said goods and merchandise for the cost and expense of their transpor-  
 tation and delivery;—and that by reason of the premises, and of the  
 representation made that the said goods and merchandise were

\* 1960 \* shipped at the rates of freight specified in the said freight  
 list, the said W. & S. are bound to make good the loss your  
 orator has suffered by their said doings, and to pay to him the sums of

money which he would have received if the said goods and merchandise had been shipped at the rates specified in said freight list, and your orator has repeatedly requested them so to do.

But now, so it is, may it please your honors, that the said W. & S absolutely refuse to comply with such request.

To the end, therefore, that they, the said W. & S., may be decreed to pay to your orator the said sums of five hundred and seventy-seven <sup>175</sup> dollars, and five hundred and ten dollars, and such losses, damages, and interest as your orator has suffered by reason of the premises, and that your orator may have such other relief as the nature of his case may require, and that the said W. & S. may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several corporal oaths, and to the best of their knowledge and belief, make answer to all and singular the premises.

May it please your honors to grant unto your orator a writ of *subpoena*, directed to the said N. W., the younger, and A. S., commanding them at a suitable time and place to appear before your honors to make answer to the premises, and to abide by and perform such order and decree as to your honors shall seem meet.

F. C. L.  
*Solicitor.*

38. *Prayer for an account in a bill by principal against an agent.*

1. That an account may be taken of all sums of money received by, or come to the hands of, the defendant, as such agent of the plaintiff as aforesaid, for or on account, or for the use of, the plaintiff, and of the application thereof; and of all dealings and transactions of the defendant, as the plaintiff's agent; and that the defendant may be decreed to pay to the plaintiff what, on taking such accounts, shall be found due from the defendant to the plaintiff; and to deliver up to the plaintiff all documents in the defendant's possession or power belonging to the plaintiff.

2. That the defendant may pay the costs of this suit.

*Bills to cancel<sup>1</sup> or to rectify and reform Agreements, Bonds, and other Instruments.<sup>2</sup>*

39. *Bill by lessee to have an agreement delivered up to be cancelled, by which he gave up the remainder of his lease, contrary to his intention, he not being able to read or write; praying also to have the original lease confirmed, — also for an account or re-payment of the land-tax paid by the plaintiff, and for an injunction to restrain the defendant from proceeding in an action of ejectment commenced by him.*

Humbly complaining, sheweth unto your honors, the plaintiff, W. A., of, &c., that on or about —, a certain indenture of lease was made

<sup>1</sup> It must now be considered as settled that Courts of Equity have jurisdiction to remove a title or claim which may operate as a cloud upon the title of the owner, and from which an injury to him might reasonably be feared, and for that purpose may decree that the deeds or other instruments by which such cloud is created, shall be given up and cancelled. *Tucker v. Kenniston*, 47 N. H. 267; *Sheafe v. Sheafe*, 40 N. H. 516; *Tappan v. Evans*, 11 N. H. 327; *Bay State Iron Co. v. Goodall*, 39 N. H. 223; *Hamilton v. Cummings*, 1 John. Ch. 516; *Pellet v. Shephard*, 5 Paige, 493; *Tieman v. Austin*, 33 Barb. 9; *Kay v. Scates*, 27 Penn. St. 31; *Kimberley v. Fox*, 27 Conn. 307.

The assignees of an insolvent debtor, who are in possession of personal property belonging to his estate, upon which he has given a mortgage the validity of which they deny, may maintain a bill in Equity against the mortgagee to obtain a decree that the mortgage be given up and cancelled. *Sherman v. Fitch*, 98 Mass. 59. So the assignee of an insolvent debtor was allowed to bring a bill in Equity to set aside an execution levied upon land in which the debtor owned a reversion. *Hall v. Whiston*, 5 Allen, 126, see *Martin v. Graves*, 5 Allen, 601; *Pierce v. Lamson*, 5 Allen, 60; *Clouston v. Shearer*, 99 Mass. 211. The Court will set aside an assignment void at law, and necessarily leading to fraud and corruption. *Arden v. Patterson*, 5 John. Ch. 44.

<sup>2</sup> The application for this species of relief is by a bill *quia timet*, and is addressed to the sound discretion of the Court upon the circumstances of the particular case, and the relief will ordinarily be afforded where injury may reasonably be apprehended, and it is made to appear that the retaining of the title or claim is clearly against conscience. The same principle will authorize the interference of a Court of Equity to prevent the acquiring of such title or claim, where it at once will become a cloud

upon the title of the owner, and injurious to him, and at the same time would be against conscience to hold it; and the cases are numerous where this power has been exerted. *Tucker v. Kenniston*, 47 N. H. 270, 271; *Pellet v. Shephard*, 5 Paige, 493; *Scott v. Onderdonk*, 14 N. Y. 9; *Lounsbury v. Purdy*, 18 N. Y. 515; *Shattuck v. Carson*, 2 Cal. 588; *Guy v. Hernance*, 5 Cal. 73; *Dean v. Madison*, 9 Wis. 402; *Lewen v. Stone*, 3 Ala. 485; *Commercial Mut. Ins. Co. v. McLoon*, 14 Allen, 351, see *Phillips v. Thomas*, 62 L. T. 793.

In the case of real estate where the defendant is in possession, the plaintiff has generally a complete and adequate remedy at Law, and cannot resort to Equity. *Thayer v. Smith*, 9 Met. 469; *Woodman v. Saltonstall*, 7 Cush. 181; *Pratt v. Pond*, 5 Allen, 59; *Spurr v. Benedict*, 99 Mass. 463; but see *Hubbell v. Currier*, 10 Allen, 333.

<sup>2</sup> See *Druff v. Lord Parker*, L. R. 5 Eq. 131; *Graham v. Berryman*, 19 N. J. Eq. 29. A mortgage was reformed under a bill to foreclose, by substituting "heirs" for "successors." *McMillan v. N. Y. Water-Proof Paper Co.* 29 N. J. Eq. 610; *Randolph v. N. J. West Line R. R. Co.* 28 id. 49. But a mortgage cannot be rectified after foreclosure: *Rutgers v. Kingsland*, 3 Halst. Ch. 658, nor a policy of insurance after suit thereon and judgment against the plaintiff: *Steinbach v. Relief Fire Ins. Co.* 77 N. Y. 498; *Washburn v. Great Western Ins. Co.* 114 Mass. 175. A discharge of a mortgage, entered by mistake in the margin of the record thereof in the registry of deeds, may be set aside in Equity. *Bruce v. Bonney*, 12 Gray, 107.

If a grantor in a deed has orally agreed to warrant that a tract of land therein conveyed should amount to seven acres, or, if it should fall short, to pay for the deficiency at a certain rate per acre, and a deed is accordingly prepared for him to execute, containing a cove-

and duly executed between E. L., then of, &c., &c., &c., whereby the said E. L. did, &c. [*stating the lease to the plaintiff*], as in and by the \* said indenture, to which the plaintiff craves leave to \* 1962 refer, when produced to this honorable Court will appear. And the plaintiff further sheweth, that he entered upon and possessed the said farm and lands under and by virtue of the said lease; and that the said E. L. departed this life in or about, &c., and that after his death, J. H., of, &c., the defendant hereinafter named, became, by purchase or otherwise, seised of or entitled to the possession of the said farm and land, subject to the said lease. And the plaintiff further sheweth that no notice was ever given to the plaintiff to determine or make void the said lease at the end of — years from the commencement of the said term of — years thereby demised, pursuant to the proviso therein contained or otherwise, but upon the expiration of such — years, the said J. H. proposed to the plaintiff to enter into a new agreement as to the said farm and lands, giving the plaintiff to understand that the interest of the plaintiff therein was determined. And the said J. H., upon that occasion, as he had frequently done before, expressed great friendship for the plaintiff, and declared that it was his wish and intention that the plaintiff should continue in possession of his said farm as long as he lived. And the plaintiff further sheweth, that the plaintiff can neither write nor read, and that the plaintiff fully believing that his interest in the said lease was determined, and that the said defendant, who is a man of fortune, was dealing fairly by the plaintiff, and was not intending to take any advantage of him, the plaintiff consented to enter into the new agreement proposed by the said J. H.; and thereupon the said defendant caused such agreement to be reduced into writing by one M. B., and the plaintiff set his mark thereto, but the same was not read once or in any manner explained to him, and such agreement was in the words and figures or to the purport and effect following (that is to say): [*To remain one year and pay the land-tax, which he was not to pay by his lease*] as in and by said agreement, &c. And the plaintiff further sheweth, that, confiding in the said J. H.'s professions of friendship for the plaintiff, and in his aforesaid declarations that it was his wish that the plaintiff should continue on his said farm as long as the plaintiff lived, the plaintiff proceeded to expend considerable sums of money in erecting new buildings upon the said farm and lands, and in other improvements thereof. And the plaintiff further sheweth that in or about, &c., the said J. H. informed the plaintiff that he must either pay an advanced rent of \$—, or deliver up possession of the said premises. And the plaintiff having refused to comply with such unexpected and unjust demand, the said J. H., on or about, &c., caused the plaintiff to be served with a notice to quit the said farm on the — day of —. And the plaintiff further sheweth

nant to warrant the land to contain seven acres, or, if it should fall short, to refund to the grantee in proportion to the quantity and price, and the grantor fraudulently erases the whole of the covenant, and delivers the deed to the

grantee without informing him of the erasure, and thereby deceives him, a bill in Equity lies to reform the deed by inserting the covenant agreed upon. *Metcalf v. Putnam*, 9 Allen, 97.

that after he had received the said notice, the plaintiff having complained to one of his relations of the great hardship of being obliged to quit his farm after he had expended so much money in improving

\* 1963 \* it, in consequence of the said defendant's assurances that the plaintiff should continue on it during his life, and having, in the course of such conversation, mentioned his lease from the said E. L., his said relation desired to see that lease, and upon perusing the same read to the plaintiff the proviso therein contained, whereby it appeared that the said lease was not to determine at the end of the first — years, without — months' previous notice. And the plaintiff further sheweth that he has since, by himself and his agents, repeatedly applied to the said J. H. and requested him to deliver up the said agreement of the — day of — to be cancelled, and to confirm the said indenture of lease of the — day of —, and to return to the plaintiff the land-tax, which he has paid in respect of the said farm since the making of the said agreement, and which he was thereby bound to pay, although he was not liable to pay it by the said indenture of lease; with which just and reasonable requests the plaintiff well hoped that the said J. H. would have complied, as in justice and equity he ought to have done. BUT NOW SO IT IS, &c. And the said J. H. has commenced an action of — in the — Court, &c., &c., to obtain possession of the said premises. And the said defendant sometimes pretends that previously to the making of said agreement of the — day of —, the said defendant had fully explained to the plaintiff that the plaintiff was entitled to hold the said premises under the said indenture of lease, until the end of the term of — years therein mentioned, and that the plaintiff was desirous to surrender and determine the said lease. Whereas the plaintiff expressly charges the contrary thereof to be the truth, and that the said defendant never did in any manner explain to the plaintiff, or give him to understand that he was entitled to hold the said farm until the end of the said term of — years. And the defendant well knew at the time of making the said agreement of the — day of —, that the plaintiff would not have entered into the same if he had been aware of his rights under the said indenture of lease, and the said defendant for that reason concealed from the plaintiff that he had such rights. And the plaintiff charges that at the time of making the said agreement the plaintiff had not the advice or assistance of any person whatsoever, but acted therein according to the suggestions of the said defendant, supposing he meant to be kind toward him, and would deal fairly by him. All which actings, &c.

And that the defendant may answer the premises; and that the said agreement, bearing date the — day of —, may be decreed to be delivered up to the plaintiff to be cancelled; and that the defendant may confirm the said indenture of lease of the — day of —. And that an account may be taken of what the plaintiff has paid for land-tax of the said farm since the making of the said agreement, and that the defendant may be decreed to repay the same to the plaintiff; and that in the mean time the defendant may be restrained by the

\* 1964 order \* and injunction of this honorable Court, from proceeding



in the said action of —, and from commencing or prosecuting any other proceedings at Law against the plaintiff for recovering possession of the said premises. [*And for further relief, &c.*] May it please, &c.

40. *Prayer of a bill to set aside a lease which had been granted upon the surrender of a form of lease, and for an account of earth and gravel dug up beyond the quantity allowed under the old lease; plaintiff offering to grant a lease, to continue for such term as was granted by the old lease, and to confirm any underleases granted by the defendant; praying also TO HAVE AN AGREEMENT AND BOND DELIVERED UP, and for costs against the defendants; — praying also IN THE ALTERNATIVE, THAT IF THE NEW LEASE OUGHT NOT TO BE SET ASIDE, THEN THE SAME MAY BE RECTIFIED, and for an injunction to restrain the defendants from digging gravel or committing waste, or granting underleases.*

And that the said lease so executed by the said L. M. as aforesaid, may be set aside as having been obtained by fraud and imposition, and that the said C. G. may be decreed to deliver up the same to be cancelled, and that he may be decreed to account with the plaintiffs for all the earth and gravel dug up and taken by him from the said premises, beyond the quantity which he was entitled to dig under the old lease, and for the profits made by him by such earth and gravel, plaintiff hereby offering to deliver up the counterpart of the said lease to the said C. G., and also offering to grant a new lease to the said C. G., for such term as would be still subsisting in the old lease, if the same had not been surrendered, upon the same terms as were contained in such old lease with respect to such part of the said term, and to allow to the said C. G., in account, the surplus rent which has been paid by him under the new lease, beyond the rent which was reserved by the old lease, and also, so far as the Court shall think fit to direct, to confirm all the leases, underleases, and assignments made by the said C. G. at any time before plaintiff's bill of complaint in this cause was filed, and to make all reasonable allowances to the said C. G. for moneys laid out upon the said premises, and generally to submit to such terms as the Court shall be pleased to impose. And that the said A. L. may be decreed to deliver up the said agreement, of the — day of —, to the plaintiff, and to deliver up the said bond executed by the said C. G. to him; and that the said A. L., as well as the said C. G., may be decreed to be answerable for and to pay all the costs of this suit, and of setting aside the present lease and granting the new one, or, if this Court shall be of opinion that the said lease ought not to be set aside, then that the same may be *reformed and* \* *rectified* by omitting the cov- \* 1965 enant contained in the said lease with respect to the apportionment of rent, and by introducing a covenant for reserving to the owner of the reversion of the property comprised in the said lease, the right of having all underleases and assignments of the said property prepared by his own solicitors. And that the said C. G. may be restrained

by injunction of this Court from digging clay and making bricks upon the said land, and from digging and removing gravel from the same; and from committing any other waste or spoil in or about the said demised premises, and from granting, or making and contracting to grant and make, any leases, underleases, or assignments of any part of the said demised premises. [*And for further relief.*]

41. *Statements in a bill to cancel a deed obtained by fraud, the property having afterwards been mortgaged to third persons without notice.*<sup>1</sup>

Bill alleges that plaintiff was aged and infirm, unable to read and write, and unaccustomed to the transaction of business; that the defendant, his brother-in-law, obtained from him authority to collect his rents and take charge of his property; and some time afterwards, with intention to defraud the plaintiff, plied him with intoxicating liquors, and brought him, while thus intoxicated, a document to sign, fraudulently representing it to be a power to collect rents and to manage his property; that this document was not read to the plaintiff, nor was he informed of its true contents, and that he signed it with his mark, relying entirely upon said representation; that he is now informed that it was a deed of conveyance of his whole estate to the defendant, for the nominal consideration of one hundred dollars; that the consideration was entirely nominal, that nothing was ever paid or agreed to be paid by the defendant for the land, and that the defendant never agreed to buy, and the plaintiff never agreed to sell or convey the land to him, or had any conversation or thought about such sale; that the defendant now assumed to own the entire estate conveyed in said deed, and had incumbered it with two mortgages (described in the bill), entirely without the consent, knowledge, or acquiescence of the plaintiff, and was about to convey away the whole estate, as the plaintiff feared and had reason to believe.

The bill prayed that the defendant might be restrained from further mortgaging, incumbering, or conveying the land, or exercising any act of ownership over it; that the deed to the defendant might be given up and cancelled; and for further relief.

\* 1966

\* 42. *To annul a contract for fraud.*<sup>1</sup>

SUPREME JUDICIAL COURT.

In Equity.

JOHN LEE . . . . .	Plaintiff.
JAMES STYLES } and HENRY JONES }	. . . . . Defendants.

<sup>1</sup> *Dodd v. Cook*, 11 Gray, 495. The Court held in this case that the defendant would be liable both for the land and for the amount of the two mortgages with which he had incumbered the estate. For *form of bill* to declare

void a levy, see *Troup v. Wood*, 4 John. Ch. 228; *Briggs v. French*, 2 Sumner, 261.

<sup>1</sup> See *Commercial Mut. Ins. Co. v. McLoon*, 14 Allen, 351.

*Bill of Complaint.*

To the Honorable Justices of the Supreme Judicial Court, &c.

Humbly complaining, sheweth unto your honors John Lee, of, &c., in the county of —, Esq., the above-named plaintiff, as follows: —

1. That on the — day of —, 1865, the plaintiff was the owner of a farm situate in the town of —, county of —. [*Describe the farm.*]

2. That the plaintiff being then old, infirm, and blind, and by reason thereof incapacitated from attending properly to business, the defendants on that day fraudulently taking advantage of the plaintiff's said incapacity, procured him to sign a certain writing, without paying him any consideration therefor, and which writing they falsely and fraudulently represented to be a mere matter of form.

3. That the plaintiff has since, and on the — day of —, 1865, applied to the defendants for said writing, or for information as to the contents thereof; but the defendants refused to allow him to see said writing or to give him any information concerning the same. That, as the plaintiff is informed and believes, the said writing is under seal and is a deed of said premises, and conveys the same, or some interest therein, to the defendants, and that they intend to use the same for their own benefit, and to the prejudice of the plaintiff.

Whereupon the plaintiff prays that this Court will declare the same to be void, and decree that defendants produce said writing and deliver it up to be cancelled, and for his costs of this suit. [*Further relief.*]

[*Prayer for subpoena.*]

43. *Allegations in a bill to reform a policy of insurance in conformity with a previously concluded agreement for insurance.*<sup>2</sup>

And thereupon your orator complains and says, that on the — day of, &c., he was the sole owner of a ship or vessel of the value of \$—, called the —, then lying at Q., in the province of —, and \* bound on a voyage from said Q. to a port of discharge in \* 1967 said U. K., on board which said ship there had been and was then laden a cargo of merchandise, the property of various persons other than your orator, and which said merchandise your orator had agreed should be conveyed in said ship, from said Q. to said port of discharge, for a certain amount of hire or freight to be paid him by said parties respectively therefor, amounting in the whole to the sum of \$—. And your orator being desirous to procure said vessel and said freight to be insured for said voyage, at and from said Q. to said port of discharge, namely, the said ship for the sum of \$—, valued at \$—, and said freight for the sum of \$—, valued at \$—, against the perils of the

<sup>2</sup> *Oliver v. The Mut. Comm. Mar. Ins. Co.* formed after suit and judgment against plaintiff. *Steinbach v. Relief Fire Ins. Co.* 77 N. Y. 2 *Curtis*, 227; see *Mackenzie v. Coulson*, Law Rep. 8 Eq. 368. But a policy will not be re- 498.

seas and other risks usually contained in marine policies of insurance, on property of such description, did, in writing by letter, bearing date, &c., request his agent, one J. E. O., of said Q., to procure the same to be insured on account of your orator, and to have the policies of insurance thereon in the name of your orator, a copy of which letter, marked (A), your orator hereto annexes and prays that the same may be taken as a part of this his bill of complaint.

And your orator further showeth, that said J. E. O., afterwards on the — day of the same —, in compliance with the request of your orator, did, through one H. M., of —, broker, request one A. McL., of the city of —, and State of —, insurance broker, to procure said insurance upon said ship and said freight, to be made and effected at some proper and solvent insurance company in said —, or in —, in said State of —, and did cause to be transmitted to said A. McL., insurance broker as aforesaid, a copy of your orator's said letter, bearing date the said —; and thereupon the said A. McL. being unable to procure said insurance to be made and effected for a reasonable premium in said —, did, in writing, authorize and request one D. R. M., of said —, commission merchant, to cause said insurance to be made and effected by some proper insurance company in said —, which said written request and authority so given by said A. McL. to said D. R. M., was and is contained in two certain letters written by the said A. McL., to said D. R. M., one of which letters bears date, &c., and the other of said letters bears date, &c.; and your orator hereto annexes copies of both said letters marked (B. and C.) and prays that the same may be taken as parts of this his bill of complaint.

And your orator further shows, that in said letter of said A. McL., bearing date the, &c., by accident and mistake, the said D. R. M. was directed to cause said ship to be insured for the sum of \$—, to be valued at the sum of \$—, and said freight to be insured at the sum of \$—, and to be valued at the sum of \$—; and in and by said letter of said A. McL., bearing date the said —, said mistake was in part corrected, and said D. R. M. was directed to insure said ship for the sum of \$—, and to insure said freight for the sum of \$—;  
 \* 1968 but \* by accident and mistake, the sum for which said ship and said freight were to be valued thereon was wholly omitted.

And your orator further shows, that the said D. R. M., after receiving said letters on the —, did apply to the said Commercial Mutual Marine Insurance Company to make insurance upon said ship and freight for your orators, according to the order and request of the said A. McL., and did then and there exhibit both said letters of said A. McL. to said Insurance Company, with the intent to inform said Insurance Company as well of the relation of said A. McL. as agent of the owners of the said ship, as to enable them to determine the character of the risk to be insured, and said Insurance Company did afterwards read and examine said letters, and on the same day did agree with the said D. R. M., acting as the agent of your orator, to insure the said ship on the voyage aforesaid, at and from said Q., for the sum of \$ —, to be valued at the sum of \$ —, and to insure the said freight of said ship on said voyage

for the sum of \$ —, to be valued at the sum of \$ —, and to receive as premium therefor the sum of \$ —.

And your orator further shows, that, thereafterwards, on the, &c., —, the said Insurance Company, with the intent and design to carry into effect said agreement, did cause to be made a writing or policy of insurance, signed by the president and secretary, bearing date, &c., a copy of which is hereto annexed, marked (D), which your orator prays may be taken as part of this his bill of complaint, and did deliver said policy to said D. R. M., the agent of your orator, as aforesaid, and did receive from said D. R. M., the agent of your orator, said premium of \$ —, which sum was thereafterwards by your orator repaid to said D. R. M.

And your orator further shows that, although, when said Insurance Company had so agreed to insure said ship and freight for the amounts aforesaid, it was well known to said Insurance Company that said A. McL. was merely the agent of the owner of said ship and of the person entitled to, and solely interested in, said freight; and that he, said A. McL., had no insurable or other interest whatever in either said ship or said freight, and that said A. McL. was, by profession and pursuit, a mere insurance broker, and that he was acting as the agent of the person who owned said ship and who was solely interested in said freight, and yet by accident and mistake said insurance on said ship and said freight was, by the terms of said policy, &c., declared to be on account of said A. McL., and without adding thereto the word "agent," or any other term indicating that he, the said A. McL. was insured as said agent of the party owning said ship and interested in said freight, and without the usual clause commonly inserted in such policies, that said insurance was effected for whom it might concern.

And your orator further shows, that said Insurance Company knew, \* and was distinctly informed by said D. R. M., by said \* 1969 letter of said A. McL. to said D. R. M., bearing date, &c., and submitted to and read by them as aforesaid, that said A. McL. was the mere agent of and broker for the owner of said ship, and had no interest whatever in said ship or freight, except so far as he would be entitled to the usual commission of a broker for procuring said insurance; and that said Insurance Company did agree, consent, and understand at the time said agreement to insure said ship and freight was made with said D. R. M., and before said policy so made to carry said agreement into effect was written and signed, that said insurance was to be made for the benefit and on account of the owner of said ship; and that said A. McL. was not the owner of said ship; nor interested therein or in said freight, and that by mere inadvertence, accident, and mistake in writing said policy of insurance, it was omitted to be inserted in said policy, that said insurance was made on account of said A. McL. as agent and for whom it might concern.

And your orator further shows unto your honors, that said policy was received by the said D. R. M., and transmitted to the said J. E. O., the agent of your orator, and by him kept and retained in ignorance, that by the terms and legal effect thereof no other interest was insured

thereby save that of the said A. McL., and in the full understanding as well by said A. McL., said D. R. M., and said J. E. O., that the interest of your orator in said ship and freight, to the extent of the sums named in said policy, was thereby insured and protected, in accordance with your orator's directions contained in his said letter to said J. E. O., bearing date the said, &c.

And your orator further shows, &c. [*Here state the loss of, &c.*]

And your orator submits to your honors, that, by reason of the premises, he is justly and equitably entitled to have said mistake so made in drawing said policy of insurance corrected, and said policy reformed by inserting therein that said insurance was made on account of A. McL. as agent, or for whom it may concern; and that the sums so insured by said company on said ship and said freight be paid to him accordingly.

And your orator further shows unto your honors, that previously to this suit being commenced, on the — day of —, and since, he applied to, and requested, and caused applications to be made to said Insurance Company, to act towards your orator in such a way as is equitable and just, and to reform said policy as aforesaid, and to adjust and pay to him the sums so insured by them on said ship and said freight, and so lost to your orator as aforesaid by reason of the perils insured against in said policy, and exhibited to said Insurance Company the usual and proper proofs of said agency of said A. McL. and of said loss, and of his sole ownership of said ship and sole interest in said freight at the time of said agreement so made with the agent

\* 1970 of \* your orator by said Insurance Company to insure the same as aforesaid, and your orator well hoped that said Insurance Company would have yielded to his said applications and paid to him the sums so insured by them and lost by him as aforesaid.

#### 44. *Charges and prayer in bill to rectify settlement and remove trustees.* [*Modern English Form.*]

The truth of the matters aforesaid would appear, if the defendants R. W. and T. W. would set forth, as they ought to do, when and where and how and from whom and in whose presence the said T. W. received the instructions for the said settlement and the said new bonds executed as aforesaid, and whether or not in writing, and what has become thereof and of the draft and copies of the said settlement and bonds, and of all letters and notes which passed about the same or the preparation thereof, and whether the said T. W. made any and what entries in any and what book or books or bill of costs about taking such instructions, or the attendances for the same, and what is become thereof.

That the said settlement ought to be rectified and altered according to the intention of the parties thereto, and that the said former securities for the said loan to the said — ought to be restored to the plaintiff, and ought to be taken as still subsisting, &c.

That the defendants — and — ought to be removed from being trustees, and new ones appointed by the said M. A. D.

*Prayer.*

1. That it may be declared, that the aforesaid exchange or substitution of the said new securities for the said several sums of £ — and £ — bank annuities, and the dividends thereof, was a fraud upon the plaintiffs.

2. That it may be declared, that the said defendants — and — respectively are liable for the said several sums, to the same extent and in the same manner as if such exchange or substitution of securities had not taken place, and that they may be decreed forthwith to pay or make good such sums respectively, or such of them and such parts thereof as they were respectively liable for before such exchange or substitution of securities took place, and that the said defendants — and — may be decreed forthwith to pay or replace the said sum of £ —

3. That, if necessary or proper, the said new securities may be delivered up to be cancelled.

4. That the said — and — may be removed from being trustees of the said settlement, and that the plaintiff M. A. D. may be at liberty to appoint new trustees thereof.

\* 5. That it may be declared, that the said settlement is im- \* 1971 properly framed in the particulars hereinbefore mentioned, and that the same may be corrected accordingly; and that the said trust moneys, when so paid or replaced, may be duly invested upon the trusts of the said settlement, when so corrected as aforesaid.

6. That the said J. W. may be declared to be responsible for what, if anything, may be lost by the aforesaid exchange or substitution of securities.

45. *Bill to have a conveyance reformed.*<sup>1</sup>

(New Hampshire.)

## TO THE SUPREME JUDICIAL COURT.

ROCKINGHAM, SS.

T. K., of, &c., complains against T. G., of, &c., and N. G., his wife, and says that on the — day of —, 1856, the said defendants, T. G. and N. G., were negotiating with one M. for the purchase of a certain

<sup>1</sup> See *Winnipisseogee Lake Cotton & Woolen Manuf. Co. v. Perley*, 46 N. H. 83; *Kenard v. George*, 44 N. H. 448; *post*, p. 1973, note.

It is the general rule that a mistake in an instrument can be reformed in Equity only when the litigation is between the original parties to it. But where one purchases with knowledge of the mistake and the true intent and design of the instrument, he stands in no better position than the original parties. *Adams v. Stevens*, 49 Maine, 362; *Freeman's Bank v. Vose*, 23 Maine, 98; *Ruhling v. Hackett*, 1

Nev. 360. To reform a deed in Equity is to make a decree, that it shall be read and construed as it was originally intended by the parties, when an error in fact has been committed. *Adams v. Stevens*, *supra*; *Lambert v. Hill*, 41 Maine, 475.

In a suit to reform a deed, the holder of an equity of redemption, not barred by the lapse of time, under a mortgage not foreclosed, is a party in interest, and must be notified; so also of the grantor in the deed sought to be reformed. *Pierce v. Faunce*, 47 Maine, 507.

farm in H., bounded, &c.; that M. agreed to sell said farm for \$1,200, and it was agreed that the plaintiff should furnish \$1,000 of the purchase-money; that M. should convey the farm to the said N. G.; that she should give the plaintiff a note for said sum of \$1,000, and a mortgage of said land, to secure the note, and that the said M., T. G., and his wife, and K., the plaintiff, all met and transacted the business in that way, and that said acts were all parts of one and the same transaction: that said K., the plaintiff, is now the owner of said note and mortgage, that said note and interest thereon is now wholly due to said K., the plaintiff, and unpaid; that at the time of said transactions said N. G. was a married woman, and the wife of said T. G.; that the plaintiff was ignorant at the time, and not aware but the security thus taken was good and valid, and that he inquired of the magistrate who made the writings, and was informed that the security thus taken would be good, and that he supposed that, having paid a part of the purchase-money for the farm, he could have an interest in or security upon the same until his debt was paid;

that said N. G. has been requested to pay the money or to surrender \* 1972 possession of the land, but declines to do either, upon the \* ground that the note and mortgage are void, because she was, at the time of their execution, a married woman; that said N. G. knew, at the time of said conveyances, that said note and mortgage were void, and that she gave them in that way for the purpose and with the intent to defraud the plaintiff; and that said T. G., well knowing all the premises, was present and assisted his said wife in consummating said fraud on the plaintiff.

Wherefore the plaintiff prays that it may be ordered and decreed that unless the defendants, or one of them, pay said sum of \$1000 and interest thereon, to the plaintiff within a reasonable time, they and each of them be foreclosed from the right to redeem said premises, or that the interest of said plaintiff in said land may be set out to him, or that his deed may be reformed, so as to give effect to the intention of the parties, and for such other relief as may be just.

T. K.

J. B., *Solicitor*.

*Decree on the above.*<sup>1</sup>

It is, therefore, ordered and decreed that said T. G. and N. G. execute and deliver to the plaintiff, within twenty days, a joint quit-claim mortgage deed of the premises described in the plaintiff's bill, to secure nine hundred and ten dollars as of the — day of —, upon the presentation to them of such a deed by the plaintiff, and that unless the said sum of nine hundred and ten dollars, with legal interest thereon from said — day of —, be paid to the plaintiff within sixty days, a writ of possession in common form, as upon mortgage, shall issue in favor of the plaintiff.

<sup>1</sup> See *Kennard v. George*, 44 N. H. 440, 444; *Winnipisseogee Lake Cotton and Woollen Manuf. Co. v. Perley*, 46 N. H. 83, 109.



46. *Bill to reform a conveyance by correcting a mistake in a boundary.*

(Title and Address.)

Humbly complaining, sheweth unto your honors, the plaintiff.

1. That on the — day of —, 186—, the defendant executed and delivered to the plaintiff, under his hand and seal, a deed, of which the following is a copy [*give a copy, containing, for example, the following description of the premises conveyed.* All that certain lot, &c., beginning at a point, &c., running thereon easterly along A. Street — feet, thence southerly along B. Street — feet, thence westerly and parallel to C. Street — feet, thence southerly and parallel to D. Street — feet, to the place of beginning.]

2. That the description therein given of the premises intended to be conveyed was erroneous, and in fact does not describe any premises \* whatever; that the word “southerly,” as last used in said \* 1973 description, was inserted by mistake of the parties<sup>1</sup> to said deed [*or otherwise, or if fraud is relied upon, the circumstances of it should be specifically stated*], instead of the word “northerly,” which should have been used instead thereof; and that in order to make said deed pass any premises whatever to the plaintiff, and to make it conform to the actual intention of the parties,<sup>2</sup> it is necessary that the said description should be rectified and reformed by substituting the word “northerly” for the word “southerly,” where the latter word is last used therein [*or say, so as to read as follows, and insert description in full as corrected*].

3. That the plaintiff has paid to the defendant for the said premises the consideration expressed in said deed.

[*Prayer that the deed may be reformed, &c.*]

<sup>1</sup> The mistake must be made out according to the understanding of both parties. *Sawyer v. Hovey*, 3 Allen, 331; *Andrews v. Essex Ins. Co.* 3 Mason, 10; *Green v. Morris*, 12 N. J. Eq. 170; *Canedy v. Marcy*, 13 Gray, 373; *Nevius v. Dunlap*, 33 N. Y. 676; *Shay v. Pettes*, 35 Ill. 360; *Harris v. Pepperell*, L. R.

5 Eq. 1; *Earl of Bedford v. Earl of Romney*, 30 Beav. 431; *Garrard v. Frankel*, 30 Beav. 445; *Durant v. Bacot*, 13 N. J. Eq. 201. But see the sensible limitations upon this doctrine in *Brown v. Lamphear*, 35 Vt. 252; see *Andrew v. Spurr*, 8 Allen, 412.

<sup>2</sup> *Ibid.*

## SECTION XIII.

*Bill to restrain the Infringement of Copyrights.*

47. *A bill to restrain a publication of a "Life of Washington," containing — pages, of which — pages were copied from Sparks's "Life and Writings of Washington," — pages being official letters and documents, and — pages being private letters of Washington, originally published by Mr. S.<sup>3</sup>*

To the Judges of the Circuit Court of the United States, for the District of Massachusetts.

The bill of complaint of C. F., T. G. W., L. T., and J. S., all of C., in the county of M., in said district, against B. M., N. C., G. P. L., and T. H. W., and C. W. U.

Respectfully show your orators C. F., T. G. W., and L. T., printers, and publishers and copartners, doing business under the name and style of F., W., & T., and J. S., gentleman, all of C., in the county of M., in said district of Massachusetts, and all being citizens of the United States, that the said J. S., is, and heretofore at the time of the infringement hereinafterwards mentioned was, proprietor of the copyright of a work of which the said J. S. is the author and compiler, entitled, "The \* Writings of George Washington, being his Correspondence, Addresses, Messages, and other Papers, official and private, selected and published from the original Manuscripts, with a Life of the Author, Notes and Illustrations, by J. S.," consisting of twelve volumes, of all which volumes respectively the copyright was taken out by said J. S., previous to the publication thereof respectively, and secured according to law, the said J. S., at the time of taking out and securing said copyrights respectively, and still being a citizen of the United States, and the term of each and all of which copyrights has still more than eight years to run; and that said F., W., and T., before the infringement hereinafterwards complained of, had, by an agreement with said J. S., undertaken and become interested in and assumed a part of the risk and responsibility of the publication of said work, and have ever since continued, and still continue, to be thus interested, and that ever since the first publication of the several volumes of said work, the public have been supplied with copies of the same by said J. S. and the publishers of the same at reasonable prices; and that said J. S. and said F., W., & T., have incurred very large expenses upon said publication, and have been and are in the receipt of large amounts, the proceeds of the sale of said work, to reimburse their expenses, and remunerate their labor and care bestowed on the same. And your orators further show that they, your orators, being in the receipt of large sums, the proceeds of the sale of said work as aforesaid, under said copyrights, B. M., N. C., and T. H. W.,

<sup>3</sup> See *Folsom v. Marsh*, 2 Story, 100.

all of B., in the county of S., in said district of Massachusetts, and G. P. L., of C., in the county of M., in the district of N. H., booksellers, being copartners under the name, style, and firm of M., C., L., & W., and also C. W. U., of S., in the county of E., in said district of Massachusetts, clerk, all of them well knowing that said J. S. held such copyrights and said F., W., & T. were interested in the said publication, and deliberately, after due notice, intending to infringe said copyrights at said B., on the fifth day of August, in the year of our Lord eighteen hundred and forty, and at divers times before and since the said fifth day of August, without the allowance and consent of your orators, or either of them, published and exposed to sale and sold a work in two volumes entitled "The Life of Washington," in the form of an autobiography, the narrative being, to a great extent, conducted by himself in extracts and selections from his own writings, with portraits and other engravings, consisting of — pages in the whole, which they still continue to expose to sale, having had due notice, and well knowing that the same is a copy from, and an infringement and piracy of, said "Writings of George Washington, &c., with a Life of the Author," so published by your orators as aforesaid. And your orators aver that three hundred and eighty-eight pages of said piratical work are copied *verbatim et literatim* from the said work so edited and compiled by said J. S., as aforesaid, and \* so published by your orators as afore- \* 1975 said, consisting of matter which was published originally by said J. S. under his said copyright, and which had never before been published or printed, and which he, the said J. S., and his assigns, had the exclusive right and privilege to print, publish, and sell and expose to sale; and that many other parts of said piratical work published by said parties complained of, besides said three hundred and eighty-eight pages, are infringements upon said J. S.'s said copyrights, whereby your orators have sustained great damage, detriment, and injury. And your orators further show, that said M., C., L., & W., and U., still continue and threaten hereafter to continue to print, publish, and expose to sale and sell copies of the said piratical work, the protests, expostulations, and warnings of your orators to them, to the contrary notwithstanding. All which actings, doings, and pretences are contrary to equity and good conscience, and tend to the wrong and injury of your orators in the premises. In consideration whereof and forasmuch as your orators are remediless in the premises at Law, and cannot have adequate relief, save in a Court of Equity, where matters of this and the like nature are properly cognizable and relievable, and to the end that said M., C., L., & W., and U. may appear and answer all and singular the matters and things hereinbefore set forth and complained of, particularly how many copies of said piratical work they have sold, what number they have on hand, and that they be restrained by injunction issuing from this Court from selling or exposing to sale, or causing or being in any way concerned in the selling or exposing to sale, or otherwise disposing of any copies of said piratical work, and that they be ordered and decreed to render an account of the copies of the same that they have sold, and to pay over the profits of such sales to the plaintiffs, and that they be ordered to surrender and

deliver up the copies on hand and the stereotype plates of said piratical work to an officer of this Court to be cancelled and destroyed, and be ordered to pay the plaintiffs their costs; and that your orators may have such other and further relief as to this honorable Court may seem meet, or as Equity may require, — may it please this honorable Court to grant to your orators a writ of *subpœna* directed to the said M., C., L., & W., and U., commanding them at a day certain, and under a certain penalty to be therein inserted, personally to be and appear before this honorable Court, then and there to answer the premises, and to stand and abide such order and decree therein as to this honorable Court shall seem agreeable to equity and good conscience.

P. & R.

*By their Solicitors.*

*Bill to restrain the Infringements of Patent Rights.*

48. *Bill for injunction to restrain the infringement of a patent right, setting out recoveries at Law and in Equity.*

To the Judges of the Circuit Court of the United States for the District of Massachusetts.

In Equity.

E. H., Jr., of B. in the State of New York, and a citizen of the State of New York, brings this his bill against C. W., of B., in the State of Massachusetts, and a citizen of the State of Massachusetts: —

And thereupon your orator complains and says, that he, being the original and first inventor of a new and useful improvement in sewing-machines, fully described in the letters patent issued to him therefor, as hereinafter stated, and not known or used by others before his invention thereof, and not at the time of his application for letters patent therefor, in public use or on sale with his consent or allowance as the inventor; and being a citizen of the United States, and having made due application, and having fully and in all respects complied with all the requisitions of the law in that behalf, did obtain letters patent therefor, issued in due form of law to him in the name of the United States, and under the seal of the Patent Office of the United States, and signed by N. P. T., Acting Secretary of State, and countersigned by H. H. S., Acting Commissioner of Patents, bearing date the tenth day of September, in the year of our Lord eighteen hundred and forty-six, whereby was granted and secured, according to law, to your orator, his heirs, administrators, or assigns, for the term of fourteen years from said date, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement in sewing-machines therein specified and claimed, as in and by said letters patent, or a certified copy thereof, here in Court to be produced, will more fully appear.

And your orator further shows unto your honors, that certain assignments of certain rights in said patent have been made and duly recorded

in the Patent Office of the United States, whereby your orator, prior to the infringements herein complained of, became and now is the sole owner of said patent; as in and by said assignments, or certified copies thereof here in Court to be produced, will more fully appear.

And your orator further shows unto your honors, that the said improvement in sewing-machines, patented to him as aforesaid, has \* hitherto been in the exclusive possession of your orator or his \* 1977 grantees; and has hitherto been and still is of great value and profit to your orator; and that a license fee or patent rent, under his said patent, has hitherto been and still is paid to your orator for the largest portion of all the sewing-machines manufactured and sold in the United States; yet the said defendant, well knowing the premises, but contriving how to injure your orator, and without his consent or allowance, and without right, and in violation of said letters patent, and your orator's exclusive rights, secured to him aforesaid, has made, used, or vended, and still does make, use, or vend to others to be used in said district and in other parts of the United States, a large number of sewing-machines, but how many your orator cannot state, but prays that the defendant may discover and set forth each, embracing substantially the improvement in sewing-machines, or a material part thereof, patented to your orator as aforesaid, and thereby the said defendant has infringed, and still does infringe, and cause your orator to fear that in future he will infringe upon the exclusive rights and privileges intended to be secured to your orator in and by his said letters patent.

And your orator further shows unto your honors, that heretofore the validity of his said patent has been uniformly affirmed after severe and repeated contestation; namely, by a verdict and judgment thereon at Law, in 1852, and by six final decrees in Equity in the Circuit Court of the United States for the District of Massachusetts, and by one final decree in Equity in the Circuit Court of the United States for the Southern District of New York, all obtained in favor of said patent prior to August, 1854.

And your orator further shows unto your honors, that the sewing-machines made and sold by the defendant, as herein complained of, are, in their essential parts and character, substantially like the sewing-machines against which injunctions were obtained in the suits aforesaid, by your orator, or by your orator and his then co-owner of said patent.

And your orator has requested the said defendant to desist from making, using, or vending to others to be used, the said sewing-machines, embracing the said improvement patented to your orator, and to account with and pay over to your orator the profits made by said defendant by reason of the unlawful making, using, or vending of said sewing-machines embracing said patented improvement of your orator. But now, so it is, may it please your honors, that said defendant has combined and confederated with other persons, to your orator unknown, but whom, when discovered, your orator prays leave to make defendants hereto, to resist, and destroy the exclusive rights and privileges secured to your orator as aforesaid, and to make, use, and vend said improvement in sewing-machines, patented to your orator as aforesaid, \* without \* 1978

the license of your orator, and in violation of his just rights in the premises, all of which is contrary to equity and good conscience.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief herein prayed, and may, under oath, and according to his best and utmost knowledge, remembrance, information, or belief, full, true, direct, and perfect answer make to all and singular the premises, and more especially may answer, discover, and set forth, whether during any and what period of time, and where, he has made, used, and vended to others to be used, for any and what consideration, any, and how many, sewing-machines, and whether or not the same embraced the said improvement in sewing-machines, or any substantial part thereof, patented to your orator as aforesaid, or how the same differed from your orator's said patent, if at all.

And that the said defendant may answer the premises, and may be decreed to account for and pay over to your orator all gains and profits realized from his unlawful making, using, or vending of sewing-machines, embracing said improvement patented to and vested in your orator as aforesaid, and may be restrained by an injunction to be issued out of this honorable Court, or by one of your honors, according to law in such case provided, from making, using, or vending any sewing-machines embracing said improvement, or any substantial part thereof, patented to your orator as aforesaid, and that the infringing machines, now in the possession or under the control of the defendant, may be delivered up to your orator, or be destroyed; and for such further and other relief in the premises as the nature of the case may require, and to your honors may seem meet.

May it please your honors to grant unto your orator, not only a writ or writs of injunction, conformable to the prayer of this bill, but also a writ or writs of *subpena* to be directed to the said C. W., and confederates, when discovered, commanding him and them, at a certain time, and under a certain penalty, therein to be limited, personally to be and appear before your honors in this honorable Court, then and there to answer unto this bill of complaint, and to do and receive what to your honors shall seem meet in the premises.

E. H., JR.

49. *Another form of bill to restrain infringements of patent rights — title having been established in previous suit — account, &c.*

To the Judges of the Circuit Court of the United States for the District of Massachusetts.

C. G., of N. H., in the State of C., and the Union India Rubber Company, a corporation duly established by the laws of the  
\* 1979 State of \* N. Y., bring this, their bill of complaint, against the  
Beverly Rubber Company, a corporation duly established by the laws of Massachusetts.

And thereupon your orators complain and say, that before the fifteenth day of June, eighteen hundred and forty-four, the said C. G.

became, and was the first and original inventor of a certain "new and useful improvement in India-rubber fabrics," which your orators verily believe had not been known or used before his invention thereof, and which was not at the time of his application for a patent therefor in public use or on sale with his consent or allowance; and being such first and original inventor, and being desirous of obtaining an exclusive property in the invention by him made, the said C. G. made application in writing to the Commissioner of Patents, expressing such desire, and delivered a written description of his invention or discovery, and a specification of improvement by him claimed: whereupon such proceedings were had, that on the fifteenth day of June, eighteen hundred and forty-four, letters patent of the United States, entitled for "a new and useful improvement in India-rubber fabrics," signed by J. C. C., Secretary of State, and countersigned and sealed with the seal of the Patent Office, by H. L. E., Commissioner of Patents, were issued to your orator in due form of law, granting to your orator, C. G., his heirs, administrators, or assigns, for the term of fourteen years from the day of the date thereof, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof was annexed to the said letters patent.

And your orators further show, that afterwards the said C. G. surrendered the said last-mentioned letters patent to the Commissioner of Patents, in due form of law, and such proceedings were had that said Commissioner did, on the twenty-fifth day of December, eighteen hundred and forty-nine, reissue to said C. G. letters patent of the United States, entitled for a new and useful "improvement in processes for the manufacture of India-rubber," signed by T. E., Secretary of State, and countersigned and sealed with the seal of the Patent Office, by T. E., Commissioner of Patents, whereupon there was granted to your orator, said C. G., his heirs, administrators, and assigns, for the term of fourteen years, from the fifteenth day of June, eighteen hundred and forty-four (being the date of the said surrendered letters patent), the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof was annexed to said reissued letters patent, as by reference to the same, or to a true copy thereof hereunto annexed, and making a part of this, your orator's bill of complaint, will more fully and at large appear.

And your orators further show, that, soon after the granting of the said original letters patent, one H. H. D. commenced infringing the \* same, and that various suits were brought against him by \* 1980 your orator, C. G., at Law and in Equity.

A suit was also commenced by your orator, C. G., against E. S. and J. B. K., the agents of said H. H. D., for infringing said patent, in the Circuit Court of the United States, for the District of Massachusetts, in the year 1845; and said H. H. D. and his said agents, E. S. and J. B. K., by their pleas, answers, and notices, denied that your orator C. G. was the first and original inventor of the improvement described and

claimed in said patent of June 15, 1844, and also denied that said patent was of any validity, for the reasons in said pleas, notices, and answers set forth, upon which allegations the parties were at issue, that said suits were pending in said Court till the fall of 1846, and for the trial of which preparation had been made on both sides.

And your orators further show, that said suits were settled upon the application of said H. H. D., and a written agreement was executed between said H. H. D. and your orator C. G., whereby said H. H. D. agreed, among other things, to pay five thousand dollars for said settlement, and for a license to manufacture certain articles under said patent and other patents of your orator C. G., and to pay a tariff therefor, and covenanted not to infringe said patent; and said H. H. D. then and thereby acquiesced in your orator's (said C. G.'s) rights, and acknowledged the validity of said patents, and said sum of five thousand dollars was paid by said H. H. D., and said suits were discontinued, except the said suit against E. S. and J. B. K., agents of said H. H. D., in which a verdict was taken and judgment entered up against them in favor of your orator C. G., and satisfied as agreed between your orator (said C. G.) and said H. H. D., as by the record thereof now produced here in Court will fully appear; and your orators further show, that soon after said settlement and the discontinuance of said suit, said H. H. D. recommenced his infringement of said patent; whereupon, your orator C. G., about the first day of November, eighteen hundred and fifty, filed his bill against the said H. H. D. in the Circuit Court of the United States for the District of N. J., setting out the said letters patent and the infringement thereof, praying an injunction and account against the said H. H. D.; to which bill of complaint the said H. H. D. filed his answer, denying the validity of the said letters patent, and setting up that some other persons than your orator C. G. were the inventors of the things patented by him, and that the said reissue to your orator C. G. was fraudulent and void, and that your orator C. G. had no title by reason thereof in his said invention: and issue being joined thereon, the parties proceeded to proofs, which were taken at great length and for a long time.

And your orators further show, that, the proofs in said cause being taken, the cause was brought to final hearing on its merits at the

March term of the Circuit Court of the United States for the  
\* 1981 District \* of N. J., in the year eighteen hundred and fifty-two,

before Justices G. and D., and by them held under advisement until the September term then next following, when the judgment of the Court was pronounced, and opinions delivered, copies whereof are hereunto annexed. And the said Court then decided that both the said letters patent were valid in Law, and that your orator C. G. was the inventor of the improvement patented, as aforesaid, by your orator C. G., and referred to in said bill of complaint; that the said reissued letters patent were lawfully reissued, and by a decree pronounced in said cause, perpetually enjoined the said H. H. D. from making, constructing, using, or vending to others to be used, the said improvements, and ordered an account to be taken of the damages due your orator



C. G. by reason of the infringements of said H. H. D. already committed; as by reference to a true copy of the judgment of the Court, or to the record of proceedings therein, ready to be produced, will more fully and at large appear.

And your orators further show, that, from the granting of the said letters patent, until the hearing of the said cause against H. H. D., said C. G. had and enjoyed an exclusive possession and use of the said improvements, by himself and his licensees, except so far as the same were disturbed by said H. H. D., and those combined and confederated with him, and by a few other persons who from time to time began to violate his rights, but who uniformly acquiesced in them, and submitted to pay tariffs for their future enjoyment, when they became acquainted with your orator's (said C. G.'s) rights secured by his patent, so far as your orators have been informed and believe.

And your orators further show, that the annexed schedule, marked A, is a correct copy of the original letters patent aforesaid; the annexed schedule, marked B, is a correct copy of the letters of reissue aforesaid; and the annexed schedule, marked C, contains true copies of the opinions delivered as aforesaid by the Judges of the Circuit Court of the United States, for the District of N. J.

And your orators further show, that, on the fifteenth day of June, A. D. 1858, the honorable J. H., Commissioner of Patents of the United States, did, as such Commissioner, duly grant to said C. G. an extension of said letters patent of June 15, 1844, as reissued December 25, 1849, for the further term of seven years from the said fifteenth day of June, A. D. 1858, and that the certificate and award of such extension were, by the said Commissioner, duly indorsed on the letters patent, of which extension was so granted.

And your orators further show, that, before the said extension, the said Union India Rubber Company held, under certain agreements, rights from said C. G. authorizing them to make various articles of India-rubber according to his process, so as aforesaid patented, and giving them the exclusive right to make clothing according to that \*process. That, on the twenty-third day of April, A. D. \* 1982 1858, and afterwards, on the third day of July, A. D. 1858, said C. G. for a valuable consideration, executed and delivered to the said Union India Rubber Company certain agreements continuing such rights. That all the agreements aforesaid are in full force, and true copies of them are hereunto annexed, those first mentioned being marked as Exhibit D, and the two last-mentioned agreements being marked as Exhibit E.

And your orators further show, that the said Union India Rubber Company, before said extension, were, and ever since have been, and now are, engaged under said agreement in the business of making and selling India-rubber goods of various kinds, including clothing, which are made under the aforesaid several agreements, according to said process of C. G., patented as aforesaid.

And your orators further show, that, amongst all persons engaged in the manufacture of India-rubber within the United States, the term or

phrase "Vulcanized Rubber Goods" is used and is understood by the defendants, and other persons in said business, to mean the fabric or product made according to said C. G.'s process, patented as aforesaid, and is so used and understood as the designation of all goods made of a compound of India-rubber in the original composition, whereof sulphur was present in any form or degree; such compound being in that state subjected to the action of artificial heat, so as to produce the chemical or other changes or effects described in said C. G.'s original and reissued letters patent, and the specifications thereto annexed. And your orators employ such phrase in this bill of complaint in the sense so explained.

And your orators further show, that, as they have been informed and believe, the said defendants, not only before the extension of C. G.'s aforesaid patent, but also since that time, have been, and they now are, engaged, without the license or consent of said C. G., or your orators, in making and selling, or causing or procuring to be made and sold, various kinds of goods of vulcanized rubber, which goods are included in the aforesaid rights of your orators. That the said defendants, in the making of such goods, have, as your orators are informed and believe, used a compound of India-rubber in which sulphur was present when the compound was subjected to the action of artificial heat, so as to produce the aforesaid changes or effects. But your orators are informed and believe that said defendants claim or pretend, as to the whole or some of such goods, that they do not subject the same to the particular degree of heat mentioned by C. G., in his aforesaid specifications, or that in some manner they avoid following exactly the process of manufacture so described by him. But your orators aver and charge that the said pretence is unfounded, and that the goods so made by said defendants, or the compounds of which they are made, have, before the completion of the manufacture, at some time, been subjected \* 1983 jected \* to the treatment or process described by C. G. as aforesaid, or some treatment or process substantially or practically similar in its nature and the same in its effects.

And your orators further show, that, as they are informed and believe, the said defendants threaten to continue making and selling, or making or selling, or causing or procuring to be made and sold, or made or sold, such goods as are above described in this bill of complaint. And your orators say that they have been damaged and injured by such acts of the defendants, and apprehend being further injured in future by the repetition or continuance of such acts.

And your orators pray that said several papers heretofore referred to in this bill of complaint, and of which copies are annexed as aforesaid, may be taken as part of such bill, your orators being prepared to prove the execution of the several agreements aforesaid, and the issuing of said letters patent, and the giving of the opinion aforesaid in N. J., and being ready to produce all such documents and papers.

All which actings, doings, and pretences are contrary to equity and good conscience, and tend to the manifest injury of your orators in the premises.

In consideration whereof, and forasmuch as your orators can only have adequate relief in this Court, where matters of this kind are properly cognizable and relievable; To the end, therefore, that the said, the Beverly Rubber Company, and their confederates, when discovered, may, upon their respective and corporal oaths, and to the best and utmost of their respective knowledge, information, and belief, full, true, and perfect answer make to all and singular the matters aforesaid and that as fully and particularly as if the same were now repeated, and they severally interrogated thereto, and more especially that they may set forth particularly:—

*First.* Whether the said suit was not brought against the said H. H. D. at the time and manner specified therein; and whether it did not result as herein described.

*Second.* Whether said Beverly Rubber Company has not made and sold, or caused and procured to be made and sold, clothing or other goods; and if so, what kind and amount of articles in the manufacture of which, at any time during the process of manufacture, or in the completion thereof, there was used or employed a compound of India-rubber in which sulphur was present, to which compound, or the goods when made thereof, artificial heat was or had been applied, so as to produce in such compound or goods the effect of vulcanization.

*Third.* Whether the said defendants have made and sold, or caused or procured to be made and sold, any, if so, what description and quantity of, goods of vulcanized rubber, or rubber compounded with sulphur, and subjected to the action of artificial heat, according to the process described in the aforesaid letters patent of C. G., or the specifications attached thereto.

\* *Fourth.* Whether the said defendants have, since the said fif- \* 1984  
teenth day of June, A. D. 1858, made or sold, or caused or procured to be made or sold, any, and if so, what description and quantity of, goods made of and from a compound of India-rubber, which compound had, at any time, or in any form, been subjected to artificial heat, so as to have become vulcanized within the meaning of that term as hereinbefore defined and used, or so as to become insensible to the action of heat or cold, or prevented from liability to decompose from the action of essential oils or animal perspiration. And that the defendants may answer the premises, and that they may be decreed to account with your orators for the quantity of articles which they have made in violation of the said letters patent or any of the rights of your orators, and to pay over to your orators such sums as may be proper as damages for such infringements, and that the defendants may be perpetually enjoined from any further violation of the rights of your orators, or of either of them. Or that your orators may have such other or further relief in the premises as may be consistent with equity and good conscience.

May it please your honors, the premises considered to grant unto your orators the writ of injunction issuing out of, and under the seal of this honorable Court, directed to the said Beverly Rubber Company, commanding and strictly enjoining them, and each of them, not to manufacture,

use, or sell, or cause or procure to be manufactured or sold, any articles of vulcanized rubber, or any articles made of a compound of India-rubber, in which sulphur is present in any form or degree, such compound, or the fabric made therefrom, having been at any time subjected to the action of artificial heat so as to be changed or affected in the manner described in the aforesaid letters patent or specifications, or so as to have become insensible to heat or cold, or not liable to decompose from the action of essential oils or animal perspiration, and from taking or selling any article made from a compound which has been, at any time, so vulcanized, or affected or changed.

And also the writ of *subpœna* issuing out of and under the seal of this honorable Court, directed to the said defendants, commanding them to be and appear at a certain day, and under a certain penalty therein to be expressed, before this honorable Court, to answer the premises, and to stand to, perform, and abide by such order, direction, and decree, as to your honors shall seem meet.

And your orators, &c.

E. M.<sup>1</sup>

\* 1985 \* 50. *English form of bill to restrain infringement of patents, and for account and damages.*

(*Title and address of bill.*)

Humbly complaining, &c., J. T., A. T., W. T., and H. T., all of, &c., the above-named plaintiffs, as follows:—

1. Before and at the time of the making of the letters patent next hereinafter mentioned, the plaintiffs had discovered, and were the sole, true, and first inventors of the improvements in machinery for the manufacture of looped or knitted fabrics in such letters patent mentioned; and no other person before or at such time made, used, exercised, or vended the said improvements or invention.

2. On the tenth of October, 1855, her present Majesty, by letters patent of that day, under the Great Seal of Great Britain, did for herself, her heirs, and successors, give and grant unto the plaintiffs her special license, that they, their executors, administrators, and assigns, or such others as the plaintiffs, their executors, administrators, and assigns, should at any time agree with, and no others, from time to time, and at all times thereafter, during the term of fourteen years from the date of the said letters patent, should and lawfully might make, use, exercise, and vend, within the United Kingdom of Great Britain and Ireland, the Channel Islands and Isle of Man, an invention for "Improvements in machinery for the manufacture of looped or knitted fabrics:" upon the condition that the plaintiffs, their executors or administrators, by an instrument in writing under their hands and seals, or under the hands and seals of one of them, should particularly describe and ascertain the nature of the said invention, and in what manner the

<sup>1</sup> See *Thompson v. Scott*, 4 Dillon, 510.

same was to be performed, and cause the same to be filed in the Great Seal Patent Office, within six calendar months next and immediately after the date of the said letters patent; as by the said letters patent, when produced, will appear.

3. In pursuance of the said condition the plaintiffs, by an instrument in writing under their hands and seals, dated the seventh of April, 1856, and enrolled in the Great Seal Patent Office on the ninth of the same month of April, 1856, particularly described the nature of their said invention, and in what manner the same was to be performed; as by the said instrument in writing, when produced, will appear.

4. *Concise statement from the specification of the nature of the invention.*

5. The said letters patents have never been impeached; and the same have, from the day of the date thereof remained, and now are, in full force, and of valid and effectual authority; and the said improvement and invention was and is novel, useful, and valuable; and from the day of the date of the said letters patent the plaintiffs have applied the said \*invention with great success; and have manufactured \* 1986 large quantities of looped fabrics by means of machinery constructed according to the said invention, and have derived great profit from the manufacture of such looped fabrics.

6. The plaintiffs have never permitted any machines to be constructed according to the said invention for any person, except for themselves; and they have never granted any license to use the said invention to any person whomsoever.

7. In the month of —, the plaintiffs discovered, for the first time, as the fact is, that the defendant has caused to be constructed for himself, and erected at L., several machines constructed according to the plaintiffs' said invention, or upon the principle of, or only colorably differing from the plaintiffs' said invention, and that by means of such machines the defendant is manufacturing large quantities of looped fabrics.

8. The defendant has made, and is now making, such goods as last aforesaid, and is selling the same, to the great prejudice and damage of the plaintiffs; and he has derived, and is now deriving, large gains and profits therefrom.

9. The defendant has sold the looped fabrics so manufactured at a great reduction on the price at which they had been sold previously by the plaintiffs; and the plaintiffs have been thereby compelled to reduce their charges for manufacturing such looped fabrics, to the great loss and damage of the plaintiffs.

10. The plaintiffs have frequently applied to the defendant, and requested him to discontinue the use of their said invention, and the infringement of their said patent, and to come to an account with the plaintiffs for the profits made by the defendant by such use and infringement; but the defendant has refused to comply with such request.

*Prayer.*

The plaintiffs pray as follows:—

1. That an account may be taken of the profits made by the defendant from the sale of looped fabrics manufactured by him by means of machines constructed according to the plaintiffs' said invention, or constructed upon the principle of, or only colorably differing from the said invention; and that the defendant may be decreed to pay to the plaintiffs what, upon taking such account, shall be found due from him.

2. That the amount of the damages sustained by the plaintiffs, by reason of the defendant infringing their said letters patent, beyond the amount which, upon taking the account aforesaid, shall appear to be the profits made by the defendants as aforesaid, may be ascertained by and under the direction of this honorable Court; and that the defendant may be decreed to pay such amount to the plaintiff.

\* 1987     \* 3. That the defendant, his servants, agents, and workmen, may be restrained, by the order and injunction of this honorable Court, from making, using, or selling machines for the manufacture of looped fabrics constructed according to or upon the principle of, or upon any principle only colorably differing from, the plaintiffs' said invention, and from selling looped fabrics manufactured by means of any such machine; except such fabrics shall have been manufactured by the plaintiffs, or by some person duly licensed by them.

4. That the defendant may pay the costs of this suit.

5. That the plaintiffs may have such further or other relief as the nature of the case may require.

## SECTION XV.

*To restrain the Use of Trade-marks, &c.*

51. *Bill by foreign plaintiffs, manufacturers in England of "Taylor's Persian Thread," to restrain the use of their names, trade-marks, envelopes, and labels placed on thread of a different manufacture.*<sup>1</sup>

To the Judges of the Circuit Court of the United States, for the District of Massachusetts.

J. T. and W. T., of the borough of Leicester, in that part of the United Kingdom of Great Britain and Ireland called England, manufacturers, subjects of Victoria the First, Queen of the said Kingdom, and aliens to each and all of the United States of America, and the territories and districts thereof, bring this bill of complaint against D. C., of F., in the said district of Massachusetts, manufacturer, a citizen of the said State of Massachusetts. And thereupon the said J. T. and W. T. complaining, say, that for many years past they have been very extensively engaged in manufacturing cotton thread at Leicester afore-

<sup>1</sup> See *Taylor v. Carpenter*, 3 Story, 458; *Marshall v. Ross*, L. R. 8 Eq. 651; *ante*, pp. 1648, 1649, and notes. For a bill to restrain the use or disclosure of a secret process of manufacture, see *Peabody v. Norfolk*, 98 Mass. 452.

said, and vending the same in large quantities, not only in England but throughout the United States, and in particular in the city of B., in said district. That their said thread is, and for many years has been, put up for sale on spools, and labelled on the top of the spools, "Taylor's Persian Thread" in a circle, in the centre of which is the number of the thread, and on the bottom of some of the spools, "J. & W. Taylor, Leicester," and on the bottom of others, "J. & W. Taylor,"

\* with the number of yards of thread on each spool, each spool \* 1988 usually containing two hundred yards or three hundred yards of thread, and the spools containing two hundred yards being black and labelled "200 yds." on the bottom of the spool, and those containing three hundred yards being red, and labelled "300 yds." on the bottom of the spools. And on the centre of some of the same labels on the bottom of each spool is stamped the symbol or print of the head and forepart of a lion rampant. And on the centre of other of said labels is stamped a coat-of-arms, the shield whereon contains a lion rampant, and over the same three balls, with the motto, "*In Deo confido.*" And your orators further say, that their spools so marked, stamped, colored, or labelled as aforesaid, are put up for sale in paper envelopes, each containing one dozen of spools; which envelopes are prepared and stamped by your orators for said purpose, and some of said envelopes bear in raised letters stamped on them the inscription, "The Persian Thread, made by J. & W. Taylor, is labelled on the top of each spool, Taylor's Persian Thread, and on the bottom J. & W. Taylor, Leicester. The above is for the protection of buyers against certain piratical articles of inferior quality, fraudulently labelled with the name of Taylor." And on other of the said envelopes is stamped a coat-of-arms representing a shield, the upper division of which is gilt, and contains three red balls, and the lower division thereof is red, and contains the effigy of a lion rampant, with the motto under the same, "*In Deo confido.*" Your orators further show unto your honors that their said thread has been and is manufactured of various sizes and numbers, to meet the wants of the trade; and by means of the care, skill, and fidelity with which your orators have conducted the manufacture thereof for a series of years, their said thread has acquired a great reputation in the trade throughout the United States, and large quantities of the same are constantly required from your orators to supply the regular demand for the consumption of the country. And your orators have established agencies for the sale thereof to the wholesale dealers and jobbers in the cities of B., N. Y., P., and N. O., and in addition thereto your orators employ B. W., now residing in said city of N. Y., as their general agent for the United States, in relation to the sale of their said spool sewing cotton thread; and a mercantile firm of H. & C. are the agents of your orators for the sale of the same in the city of B. And your orators further show unto your honors that their said thread is known and distinguished by the trade and the public as "Taylor's Persian Thread," and that your orators were the original manufacturers thereof, and the first who introduced the same to the public. That your orators' said general agent, on or about the first day of March last past

hearing that complaints were made of the quality of "Taylor's Persian Thread," proceeded to investigate the cause of said complaint, \* 1989 \* and thereupon ascertained that a spurious article of spool sewing cotton thread was offered for sale by sundry jobbers in the said city of B., as and for your orators' "Persian Thread," and that such complaints had arisen from the fraudulent imposition of such spurious article upon the public. Your orators further show unto your honors that their said agent further ascertained, upon inquiry, and your orators charge the facts to be, that the said spurious thread so sold and offered for sale in the said city of B., or some of it, was furnished to the said jobbers by said D. C., either by him personally or by one F. D. E., of B., his agent in that behalf, and your orators are informed and believe that the said D. C. has sold the said thread, put up, marked, and designated as aforesaid in the said city of B.; that the said D. C., disregarding the rights of your orators, and fraudulently designing to procure the custom and trade of persons who are in the habit of vending or using your orators' said "Persian Thread," and to induce them and the public to believe that his said thread was in fact manufactured by your orators, has engaged extensively in the manufacture of sewing cotton thread, and caused the same to be put up for sale in envelopes and on spools similar to those used by your orators, and so colored and stamped and labelled as to resemble exactly the said spools and envelopes used by your orators. And the said spool sewing cotton thread, prepared by the said D. C. and sold by him, and which he is engaged in selling as aforesaid, is an exact imitation of the same article which your orators had been manufacturing as aforesaid, and selling in the United States for many years before the said D. C. commenced his said fraudulent imitation thereof. And the said spurious article, although inferior in quality to the genuine Persian Thread manufactured by your orators, can only be distinguished therefrom, so exact is the said D. C.'s imitation as aforesaid, by a careful examination of its quality, and by its falling short in the number of yards contained on each spool from the number marked thereon as the contents thereof. And that the general appearance of the spurious article is the same as that of your orators' genuine thread, and well calculated to deceive those dealing in the purchase and sale thereof. Your orators further show unto your honors that their said general agent has obtained specimens of the said spurious Persian Thread, so sold by the said D. C. That in some of the specimens thus obtained, the thread is put upon black spools, and in other of said specimens the thread is put upon red spools, and said black and red spools are of the same size and appearance with those used by your orators, on the top of which spurious spools there is pasted a round paper label, partly gilt, on which is printed in a circle the words "Taylor's Persian Thread," and in the centre of the circle the number of the thread; and on the other end on the bottom of such spurious spools there is pasted a round paper label, on some of \* 1990 which is printed in a circle the words, "J. & W. \* Taylor, Leicester," and on others, "J. & W. Taylor," with the number of yards of thread on the spools and across *others* of the labels on said



black spools the letters and figures "200 yds.," and on said red spools the letters and figures "300 yards" are printed, and in the centre of the said labels there is impressed the figure or symbol of the head and forepart of a lion rampant. And in other of said specimens the thread is put on spools corresponding in all particulars to those herein just before described, except that the labels on the bottom thereof bear a coat-of-arms, the centre of the shield whereof contains a lion rampant, with three balls over the same, and with the motto under, "*In Deo confido.*" Your orators have also obtained specimens of the envelopes in which said D. C.'s spurious thread is put up and sold by him or his agents, which bear the same inscriptions, letters, and stamps that those used and employed by your orators bear. And in all these particulars of the labels on each end of the said spurious spools of thread, and the envelopes in which they are put up, they are exactly like the envelopes and the labels on the respective ends of the spools of your orators' genuine Persian Thread, as hereinbefore stated. Your orators further show unto your honors that they have not yet ascertained the extent to which the said D. C. has carried his said fraudulent imitation and sale of your orators' said thread. But your orators' said general agent has found the same offered for sale to the trade in at least six wholesale or jobbing houses in the city of B., as Taylor's Persian Thread, — from which your orators believe, and they therefore charge, on their belief, that the said D. C. has been and is engaged in selling his said fraudulent and spurious imitation of your orators' Persian Thread to a large extent in various places in the United States, with intent that the same should circulate and be received and used by the public as Taylor's genuine Persian Thread. And your orators further show unto your honors that the fraudulent and inequitable conduct of the said D. C. is not only injuring them in the sales of their said genuine Persian Thread, and the profits which they would otherwise reasonably make thereon; but by the inferior quality and false measure of the said spurious Persian Thread is greatly prejudicing the reputation of your orators' said Persian Thread in the market, and unless the said imitation is discontinued or prevented, will ultimately destroy the character and standing of the genuine article. And your orators also charge that the said spurious article is a fraud and deception upon such of the citizens of the State of Massachusetts, and of the United States, as purchase the same, believing it to be the genuine article manufactured by your orators. And your orators further show unto your honors, that in the month of March last past, having discovered a portion of the aforesaid fraudulent conduct of the said D. C., your orators did file their bill of complaint before the Chancellor of the State of New York, wherein they set forth many of the facts which are in substance \* hereinbefore \* 1991 stated, and prayed for an injunction to restrain the said D. C. from the aforesaid fraudulent use of the name and trade-marks of your orators, and the same was granted by the Court; and the said D. C. having appeared and filed his answer to the said bill, did therein admit that he had used the name and trade-marks of your orators in manner set forth in the bill aforesaid; but denied that the article manufactured

by him was of inferior quality to that manufactured by your orators; and afterwards an application was made to the Chancellor to dissolve the injunction aforesaid, which last-mentioned motion is now before the said Chancellor, and by reason of the great number of causes depending before him, the aforesaid cause cannot be decided without great delay. And your orators are informed and believe it to be true that the said D. C., residing out of the jurisdiction of the Chancellor of the State of New York, can, with impunity, disregard the injunction aforesaid, and that he has continued to make sale in the city of B. and elsewhere of the said thread, put up, marked, labelled, and appearing precisely like that made, put up, and sold by your orators, and your orators continue to be greatly injured thereby. In consideration whereof, and forasmuch as your orators are remediless in the premises at Common Law, and cannot have adequate relief, save by the aid and interposition of this Court, to the end, therefore, that the said D. C., if he can show why your orators should not have the relief hereby prayed, and may upon his corporal oath, and according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to the several interrogatories hereinafter numbered and set forth; and the said D. C. and his attorneys, solicitors, counsellors, agents, and servants may be enjoined and restrained from manufacturing, selling, or offering for sale, directly or indirectly, any spool cotton sewing thread manufactured by him, or any person other than your orators, under the denomination of "Taylor's Persian Thread," or on spools with the words "Taylor's Persian Thread," or "J. & W. Taylor, Leicester," or "J. & W. Taylor," printed, painted, written, or stamped, or attached or pasted thereon, or with your orators' said device of a lion rampant, or with their said coat-of-arms thereon; or on spools so made or having any label, printing, or device thereon, in such manner as to be colorable imitations of your orators' said spool thread, usually known as "Taylor's Persian Thread," and that the said D. C. may be decreed to account to your orators for all the profits which he has made by the sale of his said fraudulent imitation of your orators' thread, and all the profits which your orators would have made on the sales of their genuine thread, but for the said D. C.'s inequitable and wanton piracy of their said name, spools, and labels; and that your orators may have their costs and charges in this behalf paid by the said

D. C.; and that your orators may have such further and other \* 1992 relief in the premises as to your \* honors shall seem meet, and shall be agreeable to equity and good conscience. May it please your honors to grant unto your orators a writ of injunction, issuing out of and under the seal of this Court, to be directed to the said D. C., his attorneys, solicitors, counsellors, agents, and servants, therein and thereby commanding and enjoining them, under a certain penalty in the said writ to be expressed, according to the foregoing prayer of your orators. May it also please your honors to grant unto your orators a writ of *subpoena*, issuing out of and under the seal of this Court, to be directed to the said D. C., commanding him on a certain day, and under a certain penalty in the said writ to be inserted, personally to be and

appear before your honors in this honorable Court, then and there to answer the premises, and to stand to, abide by, and perform such order and decree therein as to your honors shall seem meet, and shall be agreeable to equity and good conscience.

C. P. C. of Counsel,	}	J. & W. T.,
C. P. & B. R. C.,		by W. B., <i>their Agent and Attorney</i>
Solicitors.		

United States of America, District of Massachusetts, ss.

Personally appeared before me the above-named B. W., on this second day of December, A. D. 1843, and made oath that this bill in Equity by him signed, in as far as it states matters within his knowledge, is true to his knowledge, and in as far as it states matters within his belief, is true to his best belief. W. W. S., Commissioner, &c.

Interrogatories to be answered by D. C. : —

1. Whether or not have you manufactured and sold in Massachusetts or elsewhere, thread put upon black spools, on one end of each of which spools is pasted, or otherwise fastened, a circular paper label partly gilt, on which is printed in a circle the words "Taylor's Persian Thread," and in the centre thereof the number of the thread, and on the other end of each of said spools is pasted or otherwise fastened a circular white paper label, on which is printed in a circle the words "J. & W. Taylor, Leicester," and across the same label "200 yds.," and in the centre of the same label there is impressed the figure or symbol of a lion rampant ?

2. Whether or not have you manufactured and sold in Massachusetts or elsewhere, thread put upon red spools, corresponding in all respects to the black spools described in the preceding interrogatory, except in the color of the spool and in the quantity of thread thereon ; and in the letters and figures "300 yds." printed across the said white paper label ?

3. What number of each kind of the said spools of thread have you manufactured and sold ? State the same accurately, and distinguish the kind and number of the thread, and the number of black spools \* and the number of red spools so sold by you since you \* 1993 commenced selling the same, and the times when and the places where the same have been sold.

4. What have been the profits made or realized by you on the manufacture and sale of thread put upon spools colored, decorated, and fitted up in the manner described in the first and second interrogatories ?

5. To whom and what persons in particular have you sold the said thread put up in the manner described in the first and second interrogatories ?

6. Who is, and who has been, your agent in Boston for the sale of your thread put upon spools fitted up in the manner described in the first and second interrogatories ?

7. Whether or not did you admit in an answer signed, sworn to, and filed by you in the Court of Chancery in and for the State of New York, to a bill of complaint therein pending wherein the said J. T. and W. T. are complainants, and yourself is defendant, that you have engaged in the manufacture of sewing cotton thread, which you have caused to be

put up for sale on spools similar to those used by the complainants, and so colored, stamped, and labelled as to resemble exactly or as nearly as the same could be done, the said spools used by the complainants, and the said spool sewing cotton, which has been prepared and sold by you is an exact imitation of the same article which the complainants had been selling in the United States many years before you commenced manufacturing your thread ?

8. Whether or not have you manufactured and sold in Massachusetts sewing cotton thread upon black spools and upon red spools, on one end of each of which is fastened a circular paper label, described as in interrogatory numbered 1, and on the other end is fastened a circular paper label on which is stamped a coat-of-arms, the shield whereof contains a lion rampant, and over the same three balls, with the motto under the shield, "*In Deo confido*," and around said shield is printed in some of said labels, "J. & W. Taylor, Leicester," and in others, "J. & W. Taylor," with the number of yards on said spools ?

9. Whether or no have you put up and sold your sewing cotton thread, colored, stamped, and labelled in all or some of the modes described in this bill in envelopes or wrappers, some bearing in raised letters the inscription, "The Persian Thread, made by J. & W. Taylor, is labelled on the top of each spool Taylor's Persian Thread, and on the bottom J. & W. Taylor, Leicester. The above is for the protection of buyers against certain piratical articles of inferior quality, fraudulently labelled with the name of Taylor," and others bearing a coat-of-arms, the upper division of which is gilt, and has three red balls thereon, and the lower division is red, and has a lion rampant thereon.

C. P. and B. R. C., *Solicitors*.

*By Joint Owner in Reference to Joint Property.*

52. *Statement in a bill to restrain a part of certain joint owners of a fund from transferring the certificates showing their right to it.*

Bill states that D. P., the defendant, and one J. C., of whom the defendants are the legal representatives, were the joint owners of a certain ship, called The Boston ; that the ship was built and sailed on joint account, and that it was afterwards seized and detained in Naples, and subsequently sold ; then the said J. C. died, and the defendants became his legal representatives. "That since the decease of the said J. C., under and by virtue of a treaty duly concluded between the Government of the United States and the King of Naples, certain indemnification was and is provided to be paid to the citizens of the United States whose property had been unlawfully seized and detained, or otherwise illegally disposed of in the manner in said treaty set forth, and that by virtue of said treaty, and under the provisions thereof, your orator and the representatives and heirs of said J. C. had jointly and equally a large and just claim for indemnification for the detention, injury, and loss of

freight, and damages consequent thereon, of said ship and cargo at said Naples aforesaid, —, and that said defendants, the said R. C., J. C., C. C., and one E. W., of N. Y., a citizen of the State, of N. Y., —, without the privity of your orator, and claiming to be the heirs-at-law of said J. C. deceased, did make claim and apply to certain commissioners, appointed by said United States, to ascertain and settle the claims of the citizens of the United States under said treaty, to have allowance and award made to them, the said defendants and said E. W., of the full and whole amount of damage and injury sustained by the seizure and detention of said vessel and cargo, as aforesaid — and did then and there present to said commissioners the register of said vessel, so made as aforesaid, in the said name of the said J. C., deceased, as evidence that said vessel was the sole property of him, the said J. C., whose sole heirs said defendants and said E. W. claimed to be, and thereupon such proceedings were had that said commissioners, relying upon said register as evidence of the sole ownership by said J. C., deceased, of said ship, did allow and award to said defendants and said E. W. a large sum of money, for and on account of the seizure and detention of said vessel and cargo, as aforesaid — and thereupon, pursuant to law in such case made and provided, the Secretary of the Treasury of the said United States did, thereafterwards, pursuant to said award, issue to said defendants and said E. W. certain certificates, purporting \* to contain that said defendants and \* 1995 said E. W. were entitled to be paid, and that they and their assigns should be paid, out of the moneys received under said treaty in certain proportions or specified sums, the amount of nine thousand four hundred and thirty dollars and eighty cents. And your orator further shows, that said defendants and said E. W. have received said certificates, and now hold the same, and that your orator was justly, equitably, and in good conscience entitled to have received and been allowed and awarded one full moiety or half part of the amount so awarded to the defendants and said E. W., and that said certificates, or one moiety thereof in amount, and one moiety of all sums by said defendants and said E. W., or either of them, that have been or shall be received under and by virtue of said award and certificates, has been and will be received by said defendants and said E. W., in trust for your orator, as jointly and equally interested with said J. C., deceased, in such vessel, her freight and earnings."

Bill prays for a writ of injunction to defendants, restraining them and each of them from any and all alienations, transfers, assignments, or other dispositions of the said certificates, as also from collecting or receiving by them, or either of them, or any person in their behalf, of any sums of money, payable under or by virtue of the said certificates.<sup>1</sup>

<sup>1</sup> Affidavits were filed in this case to establish the utter insolvency of one of the defendants, and the low character and irre-

sponsibility of the others. *Poor v. Carleton*, 3 Sumner, 70.

## SECTION XVII.

*Bill by Assignee to protect the Estate of Insolvent Debtor.*

53. *Bill for an injunction to restrain a citizen of Massachusetts from availing himself of an attachment of personal property in another State, in an action against an insolvent debtor, and thus preventing the same from coming to the assignee.*<sup>2</sup>

To the Honorable the Justices of the Supreme Judicial Court, sitting in Equity.

Humbly complaining, show unto your honors the plaintiffs, P. B., of B., in our county of S., merchant, and W. D. and H. J., both of said B., counsellors-at-law, against C. F. and D. W., both of W., in our county of W., merchants, and partners under the style of C. F. & Co.

That they were, on the first day of July last past, legally \* 1996 appointed \* assignees, under the insolvent laws of this commonwealth, of J. N. and P. H., of said B., and S. D., of said W., merchants, and partners under the style of N., M., & Co., insolvent debtors, and that they accepted said trust.

That the said N., M., & Co., on the first day of June last, were insolvent, and had stopped payment.

That on said first day of June Messrs. G., E., & P., of P., in the State of P., were, and now are, indebted to the said N., M., & Co., in the sum of three thousand dollars.

That the said C., F., & Co. were, on the said first day of June, and still are, creditors of said N., M., & Co., in the sum of twenty-two hundred dollars, and that they then knew that the said N., M., & Co. were insolvent and in contemplation of insolvency, and had stopped payment, and had reason to believe, and did believe, that proceedings in insolvency were about to be instituted by or against said N., M., & Co.

That the said C. F. & D. W. are both [citizens] of this Commonwealth, and that their debt against said insolvents was contracted and is payable in this Commonwealth.

That the said F. & W., with intent to obtain a preference over the other creditors of said insolvents, and to avoid the operation of the insolvent laws of this Commonwealth, caused a suit to be instituted against the said N., H., & D., in said P., and caused an attachment by the process of foreign attachment to be made upon the effects of said N., M., & Co., in the hands of said G., E., & P., of said P., for the purpose of collecting said debt, due by said G., E., & P., to said N., M., & Co., to the prejudice of the other creditors of said insolvents, said suit and attachment being prior to said insolvency proceedings, and still pending.

Wherefore the plaintiffs pray that the said N., H., & D. may be directed by a decree of this honorable Court to convey to them, the said

<sup>2</sup> See *Dehon v. Foster*, 4 Allen, 545; 7 Allen, 57; *Means v. Dowd*, 128 U. S. 273.

assignees, the debt of said G., E., and P., for the benefit of the creditors of said insolvent debtors, and to be held and distributed by your complainants according to law.

And that the said F. & W. may be restrained by the order and injunction of this honorable Court from levying any execution which they may obtain in said action upon said credits in the hands of said G., E., & P., and to be ordered and decreed to relinquish and abandon said attachment, and that the plaintiffs may have such other and further relief in the premises as to your honors may seem meet, and this case shall require.

May it please your honors to grant unto the plaintiffs a writ of *subpoena*, to be directed to the said J. N., P. H., and S. D., and to the said C. F. and D. W., thereby commanding them to be and appear before your honors in the Supreme Judicial Court to be holden in and for the county of Worcester, on a day, and under a pain therein specified, and \* then and there full, true, direct, and perfect an- \* 1997 swers to make, but not under oath, to all and singular the premises, and further, to stand to, perform, and abide such further order, direction, and decree therein, as to your honors shall seem meet.

## SECTION XVIII.

### *Bills by Next of Kin for Account and payment of Distributive Shares.*<sup>1</sup>

54. *Bill by intestate's brother and sisters against his widow and administratrix for their distributive shares of his estate; and for an injunction against her and the bank, or other corporation, to restrain the sale of a sum of stock standing in deceased's name, under a suggestion of her intention to leave the country.*

To, &c.

Humbly complaining, show unto your honors, the plaintiffs S. M., of, &c., C. M., of, &c., widow, and A. L., of, &c., widow, that A. M., late of, &c., gentleman, was, in his lifetime and at the time of his death, possessed of and well entitled to a considerable personal estate, consisting of moneys in the funds, debts due to him, household goods,

<sup>1</sup> See for substance of bill in such case, admitting and alleging grounds to avoid a settlement and adjudication in the Probate Court, *Gould v. Gould*, 3 Story, 516; see also the answer in that case. The Courts of the United States, as Courts of Equity, possess jurisdiction to maintain suits in favor of legatees and distributees for their portions of the estate of the deceased, notwithstanding there may be, by the local jurisprudence, a remedy at Law on the administration bond, in favor of the party. This class of cases is of concurrent and not of exclusive jurisdiction. *Pratt v. Northam*, 5 Mason, 95. The bill in this case charged that all the debts of the

testator had been paid, except that due to the plaintiffs, and prayed for an account of the personal estate of the testator, and that if the same, exclusive of, &c., was sufficient to pay the plaintiffs, that the executors might be decreed to pay accordingly; or in case of a deficiency of personal estate, that the executors might be decreed to sell enough of the real estate to make up the deficiency; and for general relief; see also *Allen v. Simons*, 1 Curtis, 122; *Mallett v. Dexter*, 1 Curtis, 178; *Stearns v. Page*, 1 Story, 204; *Sands v. Champlin*, 1 Story, 376; *Gould v. Gould*, 3 Story, 516, 537; *Langdon v. Goddard*, 2 Story, 267.

plate, linen, china, wearing apparel, and divers other effects of a considerable amount and value, and particularly was possessed of a large number of shares in the stock of——. And the plaintiffs further show that the said A. M., in and about the month of, &c., departed this life, intestate, and without issue, leaving F. M., his wife, one of the defendants hereinafter named, and the plaintiff, his brother, and the plaintiffs, his sisters, and only next of kin him surviving. And the plaintiffs further show, that since the death of the said intestate, the said F. M., his wife, has obtained letters of administration of the goods, chattels, rights, and credits of the said intestate to be granted to her, by and out of the proper Court, and has, by virtue thereof, possessed

\* 1998 herself of the personal \* estate and effects of the said intestate to a very large amount and value, and much more than sufficient to pay and satisfy his just debts and funeral expenses, exclusively of the said shares of stock. And the plaintiffs further show that being entitled as brothers and sisters of the said intestate to a distributive share of his personal estate, the plaintiffs have frequently, by themselves and their agents, applied to the said F. M., and requested her to come to a full and true account with the plaintiffs for the personal estate and effects of said intestate, and to pay them respectively one-third part each of one moiety of the clear residue thereof, with which just and reasonable requests the plaintiffs hoped the said F. M. would have complied. BUT NOW SO IT IS, &c. And the said defendant pretends that the personal estate and effects of the said A. M. were small and inconsiderable, and not more than sufficient to pay and satisfy his debts and funeral expenses, and that she has applied all such personal estate and effects in a due course of administration. Whereas the plaintiffs charge the contrary thereof to be truth, and so it would appear if the defendant would set forth, as she ought to do, a full and true account of all and every the personal estate and effects of the said intestate, which have been possessed or received by the said defendant, or by her order, or to her use, and of her application thereof. And the plaintiffs further charge that the said F. M. has declared to several persons that she means to obtain a transfer of the said shares of stock, and to sell and dispose of the same and to withdraw herself to ——, with the produce thereof; and the corporations, in which said stock is held, intend to permit her to make such transfer. All which actings, &c.

And that the defendants may answer the premises, and that an account may be taken by and under the direction of this honorable Court of the personal estate and effects of the said intestate, A. M., possessed by or come to the hands of the said defendant F. M., his widow and administratrix, or to the hands of any other person or persons, by her order or for her use; and also an account of the said intestate's debts and funeral expenses, and that the said intestate's personal estate may be applied in a due course of administration, and that the clear residue thereof may be ascertained, and that the plaintiffs respectively may be paid one-third part each of one moiety of such clear residue, and that in the mean time the said defendant F. M. may be restrained by the injunction of this honorable Court from selling or



disposing of or transferring the said stock, and that the — may be restrained from permitting such sale or transfer. [*And for further relief.*] May it please, &c.

[*Pray subpoena and injunction against F. M., and the said — (corporations).*.]

\* 55. *Bill by some of the next of kin of an intestate for payment of their shares of the estate.* [*Modern English Form.*] \* 1999

1. A. B., late of, &c., deceased, was, at the time of his death, possessed and entitled of and to a considerable personal estate.

2. The said A. B. died on the — day of — [a widower and], intestate, leaving the plaintiffs and — and —, his children and sole next of kin, him surviving.

3. On the — day of —, the defendant procured letters of administration to the goods, chattels, and credits of the said A. B. to be granted to him by the proper Court for that purpose, and the said defendant thereby became and now is the sole legal personal representative of the said A. B.

4. The defendant, as such administrator as aforesaid, has taken possession of all the movable chattels of the said A. B., and has received certain sums of money in respect of debts which were owing to the said A. B. at the time of his decease.

5. The assets of the said A. B., which have come to the hands of the defendant, were and are much more than sufficient for payment of all the debts and funeral expenses of the said A. B., and he has paid or ought to have paid the same.

6. The defendant has, in fact, in his hands, a large surplus or residue in respect of the intestate's personal estate, which is divisible, and ought to be divided amongst the plaintiffs and the said — and —, as his sole next of kin.

7. The plaintiffs have applied to the defendant to furnish them with an account of the personal estate of the intestate, and of the application thereof, and to divide the residue thereof amongst the plaintiffs and the said — and —, but he has refused so to do.

#### *Prayer.*

The plaintiffs pray as follows: —

1. That an account may be taken of the personal estate of the intestate, come to the hands of the defendant, or of any person or persons by his order or for his use.

2. That an account may be taken of the debts and funeral expenses of the intestate.

3. That the clear residue of the personal estate of the intestate may be ascertained, and that one equal — part of such residuary estate may be decreed to be paid to each of the plaintiffs, and that another equal — part thereof may be decreed to be paid to the defendant, and to each of them, the said — and —.

4. [*Prayer for general relief.*]

\* 2000 \* 56. *Bill by feme covert and her children for a settlement, against the assignee of her husband, of her share in personal property, derived under a will. [Modern English Form.]*

In Chancery.

Lord Chancellor.

Vice Chancellor.

[*Title.*]

Humbly complaining, show unto his Lordship, A. M., wife of —, the defendant, C. M., by — of —, her next friend, and D. E. and F. G., infants under the age of twenty-one years, by the said —, their next friend.

[*The bill states a case, showing that A. M. has become entitled to a share in the residuary estate of the testator, that C. M., her husband, has become bankrupt, and the defendants, — and are his assignees.*]

No settlement or other provision for the due support and maintenance of the plaintiff A. M. was made on the occasion of her said marriage with the defendant C. M., or has at any time since been made.

The plaintiff A. M. is therefore advised and submits, on behalf of herself and the other plaintiffs, her children, that they are entitled to have a proper settlement of part of the aforesaid sum of money, which is now held by the defendant, — [*the executor of the testator*], as the part and share of the plaintiff A. M. in the residuary estate of the said testator.

The plaintiffs have, accordingly, frequently applied to the said last-named defendant, and also to the said — and — [*the assignees*], and have requested that they would consent and agree that a proper settlement should be made of the said sum, and in particular the plaintiffs have requested the said — [*the executor*], not to pay over the whole share of the said A. M. to the said last-named defendants, but to retain the same until such settlement or provision be made thereout as aforesaid; but they refused to comply with such requests.

### *Prayer.*

The plaintiffs pray as follows : —

1. That it may be declared that the plaintiff A. M. is entitled, for the benefit of herself and the other plaintiffs, her children, to have a settlement made upon them and her other issue, if any, by the said C. M., out of the part or share to which the plaintiff A. M. is entitled in the residuary estate of the said testator, now remaining in the hands of the said — [*the executor*].

2. That the proper directions may be given for the preparation and execution of such settlement.

\* 2001 \* 3. That in the mean time the said defendant — [*the executor*] may be restrained by the order and injunction of this honorable Court from paying over or transferring to the defendants —

and — [the assignees], or either of them, the said share of the plaintiff A. M. in the said residuary estate and effects, or any part thereof.<sup>1</sup>

4. [For further relief.]

## SECTION XIX.

### *Bills of Interpleader.*

57. To settle and adjust claims to money due under a bond or obligation — offer of money — injunction against suit.<sup>2</sup> [Modern English Form.]

Between Sir H. M. and others . . . . . Plaintiffs,  
and  
A. B., H. J., and M. J. his wife [and  
three children, infants], T. B., S. B.,  
and R. J., . . . . . Defendants.

[The bill set forth a bond of the plaintiffs who were partners together in trade, for payment of £18,000, to M. J., when she was unmarried; the marriage of the defendant H. J. and M. J., his wife, and the issue of the marriage, \* viz., the three infant defendants; a settlement \* 2002 made previously to their marriage, by which the bond, together with

<sup>1</sup> *Equity for a settlement.* — 1. The wife's equity for a settlement does not depend on any right of property in her, but rests on the control which Courts of Equity exercise over property falling under their dominion, and it is an obligation which the Court fastens upon the property, but not upon the right to receive. *Osborn v. Morgan*, 9 Hare, 432; 16 Jur. 52; 31 L. J. Ch. 218; *ante*, Vol. I. p. 91.

2. As to the property to which this right extends, see *Barrow v. Barrow*, 18 Beav. and S. C. on appeal, 24 L. J. Ch. 267.

3. When it attaches, see *ante*, Vol. I. p. 91; *Lloyd v. Mason*, 5 Hare, 149; *Baker v. Boyldon*, 8 Hare, 210.

4. As to amount of proportion of fund to be settled, see *ante*, Vol. I. p. 102.

For instances where the Court has given the whole fund: *Bankruptcy of husbands*, *Re Wilson*, 1 Jur. N. S. 569, V. C. S.: *Purchaser from assignee of husband, an insolvent*, *Francis v. Brooking*, 19 Beav. 347; *Scott v. Spashett*, 3 MacN. & G. 599; *Gent v. Harris*, 10 Hare, 383; *Divorce à mensa et thoro* obtained by the wife, *Barrow v. Barrow*, 18 Beav. and 24 L. J. Ch. 267; *In re Lewin's Trust*, 20 Beav. 378.

Where the fund was under £200, and the husband had become bankrupt, *In re Cutler*, 14 Beav. 220; 15 Jur. 911.

Where a part only of the fund has been

settled, *Ex parte Pugh*, 1 Drew. 232; *Aubrey v. Brown*, 25 L. J. Ch. 446; 4 W. Rep. 446, V. C. W.

5 *Terms or provisions of settlement.* — In settling a wife's property under an order of the Court giving effect to her equity to a settlement, there is no established rule entitling her to have the property limited, in the events of failure of issue of the marriage and of her dying in her husband's lifetime, upon such trusts as she shall appoint, and subject thereto upon trust excluding the husband from any interest in the settled portion of the property. In the absence of special circumstances, the limitation in the events above-mentioned should be to the husband. *Carter v. Taggart*, 1 De G. M. & G. 286; 21 L. J. Ch. 216.

<sup>2</sup> This is the bill in *Meux v. Bell*, 6 Sim. 175. It was settled by the late Mr. Jacob. In the case referred to, Sir Launcelot Shadwell V. C., upon the argument of a demurrer by one of the defendants, held, that it was not necessary for the plaintiff upon his bill to offer to pay the money into Court, although, before he took any step in the cause, it was necessary that he should do so. The ordinary practice is, however, to offer by the bill to pay the money into Court. It will be perceived, too, that no case is suggested by the plaintiff for or on the part of any of the defendants.

*the principal money and interest thereby secured, was assigned to the defendants T. B., S. B., and R. J., upon certain trusts for the benefit of the said M. J., her said husband, and their issue, "but the plaintiffs are not acquainted with the particulars of the said settlement, and crave leave to refer thereto."]*

The said T. B., S. B., and R. J. claim to be entitled under the said settlement to receive the principal moneys and interest secured by the said bond.

The plaintiffs have lately discovered that the said bond or obligation is now in custody or possession of the defendant A. B., and he claims to be entitled thereto, and the principal money and interest thereby secured.

On or about, &c., a notice in writing was served upon the plaintiffs, by the solicitor of the last-named defendant, which is in the words following, &c. [*Claiming the money.*]

*[Statement of applications to the plaintiffs by the defendant A. B., and of threats to prosecute an action or suit, and that he has actually sued out a writ in the Court of — in the names of the said H. J., and M. J. his wife, against the plaintiffs.]*

The other defendants, T. B., S. B., and R. J., also threaten and intend to commence and prosecute some proceedings at Law or in Equity against the plaintiffs, on the recovery of the amount due from the plaintiffs upon the said bond. Plaintiffs submit that the said defendants ought to interplead between themselves, the plaintiffs being ready and hereby offering to pay the same to such of the defendants as this honorable Court may determine to be entitled thereto.

The said last-named defendants ought to set forth the particulars of their respective claims to the moneys due upon the said bond or obligation, and how to make out the same.

### *Prayer.*

1. That the defendants may answer the premises, and that the defendants may be decreed to interplead and settle and adjust between themselves their right or claims to or in the money due or payable under the said bond or obligation, the plaintiffs being ready and willing, and hereby offering to pay the moneys due and payable under the same to such of the said defendants as this honorable Court may determine to be entitled thereto.

2. That the said defendant A. B. may be restrained by the order and injunction of this honorable Court from prosecuting the said action so commenced by him as aforesaid against the plaintiffs; and that all the said defendants may be respectively restrained by the order and injunction of this honorable Court from prosecuting or commencing any other

\* 2003 \* action or actions or legal proceeding or proceedings against the plaintiffs, or any or either of them, for the recovery of the moneys due or to become due or payable under the said bond or

obligation, or any part thereof, or otherwise concerning the matters aforesaid.<sup>1</sup>

### 3. [*For general relief.*]

*Common affidavit to be annexed to bill in an interpleader suit.*

[*Title, &c.*]

I, —, the above-named plaintiff, make oath and say, that the bill in this suit [*or, the bill hereunto annexed*] is not filed by me in collusion with *any* or either of the defendants in the said bill named, but such bill is filed by me of my own accord for relief in this honorable Court.<sup>2</sup>

*Another form of affidavit to bill of interpleader.*

In Chancery [*or Equity*].

Between J. C. . . . . Plaintiff,

and

—— . . . . . Defendants.

The said J. C. maketh oath, and saith that he has exhibited his bill of interpleader against the defendants in this cause without any fraud or collusion between him and the said defendants, or any or either of them; and that the said J. C. hath not exhibited his said bill at the request of the said defendants, or of any or of either of them, and that he is not indemnified by the said defendants or by any or either of them, and saith that he hath exhibited his said bill with no other intent but to avoid being sued or molested by the said defendants, who are proceeding, or threaten to proceed, at Law against him for the recovery of the rent of the said —, in the bill mentioned.

Sworn, &c.

J. C.

### 58. *Prayer in a bill of interpleader by an insurance company.* [*Modern English Form.*]

1. That the defendants — and R. S. may interplead together, and that it may be ascertained to whom the said sum of, &c., and the interest \* thereon belongs and ought to be paid, and that the \* 2004 plaintiff, on behalf of the said Atlas Insurance Company, may be at liberty to pay the said sum of, &c., with interest thereon at the

<sup>1</sup> In *Bignold v. Audland*, 11 Sim. 23, it was held, that, where a bill of interpleader is filed by the secretary or officer of a company on their behalf, the affidavit to be annexed to the bill ought to be, not that the plaintiff does not collude, but to the best of the plaintiff's knowledge and belief the company do not collude with the defendant, and if the bill is filed respecting a sum of money in respect of which interest is recoverable at Law, the bill

should contain an offer to pay interest, as well as the principal sum. The practice is for counsel to move, *ex parte*, for leave to pay the money into Court and for an injunction.

<sup>2</sup> In *Stevenson v. Anderson*, 2 V. & B. 407-410, Lord Eldon observed that the form of affidavit in *Harrison's Practice* seemed to go too far in stating that the bill was filed without the "knowledge" of either of the defendants.

rate of — per cent per annum, from the — day of —, into the Bank of England in the name of the Accountant-General of this honorable Court, in trust in this cause (which the plaintiff hereby offers to do), for the benefit of such of the said parties as shall appear to be entitled thereto.

2. That the defendants may be restrained by the order and injunction of this honorable Court from further proceeding with the said action so commenced, &c., and from commencing any other action or actions at Law against the said company, or the secretary thereof, in respect of the matters aforesaid.

59. *Affidavit of secretary to public company to be annexed to bill in interpleader suit.*

I, H. D., of, &c., make oath and say, that I am secretary of the — Insurance Company, and that I do not, and to the best of my knowledge and belief the said Insurance Company do not, nor do or does any members or member thereof, collude with either of the defendants named in the bill hereunto annexed, but such bill is filed by me, on behalf of the said company, of my own accord for relief in this honorable Court [*or, if the company is plaintiff, say, "but such bill is filed by the said company of its own accord, for relief, &c."*].

60. *Statements in a bill by a purchaser against different persons claiming payment for the property purchased.*<sup>1</sup>

Bill states that, on the — day of —, the plaintiff purchased of the defendant Salter a cargo of coal, then on board of a vessel, at ten dollars per chaldron, amounting to eleven hundred and twenty-five dollars, payable in a note at thirty days. The coal was delivered to the plaintiff, who paid Salter one hundred dollars on account. That the defendants P. & S. Schermerhorn afterwards issued an attachment against W. W. as an absent debtor, and the defendants F. & B. caused another attachment to be issued against W. W. as an absconding debtor, and warrants were issued in the usual form to the sheriff of —, who gave notice to the plaintiff not to pay over to any person except the sheriff, any property or money of W. W., and the plaintiff was informed by the sheriff, and the attorneys of the defendants P. & S. S., and F. & B., that the coal so purchased by him was the property of W. W., for whom the defendant Salter was only an agent, and that the plaintiff would be held liable if he paid the residue of the money \* 2005 to Salter. That the plaintiff \* applied to the defendants for leave to pay the money to Salter without responsibility; and he also, applied to Salter, to relieve or secure him against the operation of the attachment, and any further responsibility, which they respectively refused to do, and that Salter had commenced a suit at Law

<sup>1</sup> Richards v. Salter, 6 John. Ch. 445.

against the plaintiff to recover the money. The plaintiff averred that he was always ready and willing to pay the money if he could do so safely, and offered to pay it into Court. He prayed for an injunction to restrain the suit at Law, and for relief generally. The bill was accompanied with the usual affidavit, denying any collusion and indemnity, &c. Upon the plaintiff's paying the money into Court, an injunction was granted.

61. *Prayer that the defendants may interplead — that plaintiff may be at liberty to pay the arrears of rent into Court, first deducting thereout certain sums for repairs and land-tax — that possession may be delivered to the party entitled, and an allowance made to the plaintiff for certain articles — and for an injunction to restrain proceedings in ejectment and distresses being made upon the premises.*

And that the said several defendants may be decreed to interplead touching their said several claims, and that plaintiff may be at liberty to pay the several sums now justly and fairly due from him for the rent of the said messuage or tenement and premises into the bank, in the name and with the privity of the Accountant-General [*or of the clerk*] of this honorable Court, in trust for the benefit of the persons or person entitled thereto, subject to the further order of this Court, after deducting thereout in the first place, the aforesaid sum of —, to be allowed unto plaintiff for repairs pursuant to the said agreement, together with all sums of money expended and advanced by the plaintiff for land-tax and other necessary outgoings in respect of the said premises. And that plaintiff may be at liberty to quit the possession of the said premises, and that possession thereof may be delivered up to such person or persons as this honorable Court shall direct or appoint. And that plaintiff may have a satisfaction or allowance made out unto him out of the rent of the said premises for the several articles hereinbefore, and in the said first agreement particularly mentioned, which have been provided by plaintiff at his own expense for the said premises. And that in the mean time the said defendants S. O. and T. C. may be restrained by the order or injunction of this honorable Court from all further proceedings in the aforesaid action of ejectment brought against plaintiff, and that they and all the said other defendants may be in like manner restrained from making any distresses or distress upon the said messuage or tenement and premises, and from commencing or prosecuting any action or actions at Law against plaintiff to recover the rent of the said premises, or to turn \* plaintiff out of possession \* 2006 thereof, or otherwise from proceeding at Law against the plaintiff touching any one of the matters aforesaid. And that all proper and necessary directions may be given for the purposes aforesaid. [*And for further relief.*]

62. *Amended bill of interpleader — by an executor — praying injunction against suits, and offering to bring fund into Court.*

SUPREME JUDICIAL COURT. April Term, 1861.

SUFFOLK, SS.

In Equity.

C. G. L., Executor of I. T. v. I. T. *et al.*

And now the said plaintiff, with the consent of the defendants, and by leave of Court, files his amended bill in the words and figures following, to wit:—

This plaintiff alleges that I. T., of Boston, merchant, deceased, in and by his last will and testament, which was duly proved and allowed, appointed the plaintiff, and F. D., and C. B., whom he hath survived, executors; and among other things, made a provision for the benefit of his son Andrew, in the words following, to wit: "I give to my son Andrew . . . forty thousand dollars, of which one-half, or twenty thousand dollars, is to be placed by my executors with the Massachusetts Hospital Life Insurance Company in such manner that my said son shall receive the interest and income thereof during his life, and at his decease the principal shall be paid to his lawful heirs; the other half, or twenty thousand dollars, is to be paid to my said son for his own use, and to be at his own disposal, the whole forty thousand to be so placed and paid, as aforesaid, within one year after my decease, and as the same can be raised to the best advantage:" as will more fully appear by reference to the said will.

That the said executors, on the sixth day of December, A. D. 1832, deposited the said sum of twenty thousand dollars with the said corporation for the benefit of the said Andrew, and received a receipt as and for an annuity, in trust, a copy of which is filed hereunto, and that the interest and income thereof was duly paid to the said Andrew during his lifetime.

That, as the plaintiff has been informed, the said Andrew during his lifetime cohabited with a person named Katharina Bayerl, in parts beyond the seas, and that the said Katharina, on or about the twentieth day of September, 1848, bore a female child, afterwards named Anna, which she alleges to be the child of the said Andrew, and which, as she alleges he afterwards acknowledged as such; but the plaintiff has no knowledge of his own concerning these alleged facts.

\* 2007 \* That afterwards, as the plaintiff has been informed, the said

Katharina bore a male child, which was christened on the twenty-sixth day of May, 1851, by the name of Andreas, and as an illegitimate child of the said Katharina, which she also alleges to be the child of the said Andrew, and that he afterwards acknowledged the same to be his son, but the plaintiff has no knowledge of his own concerning these alleged facts.

That afterwards, on the fourth day of August, 1851, the said Andrew and Katharina, at the city of Frankfort-on-the-Main, in parts beyond the seas, made and signed a certain declaration in the words and figures following, to wit:—



*“Marriage Agreement.*

“We, the undersigned, Andrew Thorndike, of the city of Boston, county of Suffolk, and State of Massachusetts, aged sixty years, and Katharina Bayerl, of the city of Mainz, in the Grand Duchy of Hesse, aged twenty-six years, do hereby declare, that we have truly and solemnly promised to marry each other, and that we now both wish to enter in the state of marriage: and that we desire, in conformity with the laws of the United States of America, that the civil act of our union in marriage may be executed in the usual form before Ernest Schwendler, Esquire, the duly appointed Consul of the United States of America for this Free City. We therefore confirm, by these presents, our mutual consent to the desired conjugal union, and do sincerely and solemnly promise scrupulously to fulfil the duties of husband and wife, by virtue of our respective seals and signatures.

“Frankfort-on-the-Main, Aug. 4, 1851.

“(Signed) ANDREW THORNDIKE,

” KATHARINA BAYERL.

“Sealed and signed in presence of

“(Signed) G. LINDHEIMER,

” I. ECKHARDT,

as witnesses.

“The foregoing marriage agreement has, therefore, been entered accordingly, and duly subscribed by the aforesaid parties, not only in the Consular Register, but also on two duplicate copies of the present marriage act, delivered to the said parties at their request.

“In testimony whereof, I have hereunto set my hand and seal of office, at Frankfort-on-the-Main, this fourth day of August, 1851, in the seventy-sixth year of the Independence of the United States.

“(Signed) ERNEST SCHWENDLER, U. S. Consul. [L. s.];”

which was entered in the Register of the American Consulate in said city, and thereafterwards, as the plaintiff is informed, the said

\* Andrew and Katharina lived and cohabited together as man \* 2008 and wife until his decease, which occurred on or about the twenty-first day of July, 1854.

That by his last will and testament, which has been duly proved and allowed in this county, the said Andrew appointed N. I. B., of said Boston, and C. B., since deceased, executors of his will, who were duly appointed as such, and he made divers provisions therein for the benefit of his wife Katharina, and son Andreas, so called, but none for the benefit of the said Anna, who is not mentioned therein.

That the surviving executor of the said Andrew, as the plaintiff is informed, claims the right to receive from the plaintiff the said sum of twenty thousand dollars, on the ground that by the will of the said I. T. the same was absolutely given to the said Andrew, and formed a part of his estate, subject to his disposal by will.

That the said Anna Bayerl, *alias* Thorndike, as the plaintiff is informed,

claims that she is the daughter of the said Andrew and Katharina, that they were afterwards lawfully married, and that he recognized her as his child after such marriage, and is, therefore, a lawful heir; and that she and her brother, the said Andreas, are entitled to have and receive the said sum of twenty thousand dollars, alleging that by the will of the said Israel a life interest on said sum only was given to the said Andrew, with remainder to his lawful heirs.

That the said Andreas Bayerl, *alias* Thorndike, as the plaintiff is advised, insists that he is the son of the said Andrew and Katharina, that they were afterwards lawfully married, and that he, the said Andrew, afterwards recognized the said Andreas as his only child and heir-at-law, and that as such he is entitled to have and receive the whole of the said sum to his own use.

And the said Andrew, at the time of his death, had certain brothers and sisters then living, to wit: I. T., of the city of New York, merchant, a brother; A. L., of said Boston, widow, a sister; E. B., wife of the said N. I. B., and S. E. M., wife of R. M. M., of said Boston, merchant, surviving children of a deceased sister; E. F., E. A. T., and C. A. T., now or lately of Ravenna, Portage County, Ohio, sons of a deceased brother; E. T., M. A. B., wife of M. S. B., now resident at Paris, in the Empire of France; E. T. T., now resident in parts unknown; A. D. S., wife of E. de S. now resident at Paris, aforesaid; M. S. P., wife of R. T. P., of said Boston, daughters of a deceased brother; C. T., and A. T., a brother, who deceased after the said Andrew, having first made his will, which was duly proved in this county; and S. T. D., of said Boston, appointed executor thereof.

That the said brothers and sisters, and representatives of deceased brothers and sisters, or some of them, insist that by the will of said I. T. the said Andrew was entitled only to a life-interest in the said sum of twenty thousand dollars, and that the remainder was given to \* 2009 his \*lawful heirs; that the said Andrew and Katharina were never lawfully married, and that the said Anna and Andreas are not the children of the said Andrew, or if either of them are, or is, that she or he were not born in wedlock, but were illegitimate, and not entitled to claim as lawful heirs, and that the brothers and sisters of the said Andrew, and the representatives of deceased brothers, are the lawful heirs, and as such are entitled to have and receive the said sum of twenty thousand dollars to their own use.

That the plaintiff is informed that the property of the said daughters of the said C. T. was settled in trust to their separate use, and that the said M. S. B. is the trustee of that belonging to his wife; that E. A. B., of said Boston, is trustee for the benefit of the said E. T. T. and A. D. S.; and that J. P., of said Boston, is trustee for the benefit of the said M. S. P.; but whether the said settlements, any or either of them, would include the interest to which the said daughters would be entitled if declared heirs-at-law, as aforesaid, the plaintiff is not advised, and does not know.

That J. G., of said Boston, counsellor-at-law, has been duly appointed, by the Court of Probate for this county, guardian of the said Andreas,

and as such has demanded payment from the plaintiff of the said sum of twenty thousand dollars; that the said I. T., before the filing of the original bill, had brought a suit at Law against the plaintiff, claiming his proportionate part of said sum as one of the lawful heirs; by reason of which the plaintiff is exposed to great risk, and danger of trouble, expense, and litigation, and that various claims have been or may be preferred against him on behalf of some of the other persons hereinbefore mentioned.

That the plaintiff is ready and willing to pay the said sum of money to such of the said persons, if any, as shall be found legally entitled to receive the same; but by reason that they persist in their several adverse claims, the plaintiff is advised that he cannot safely pay the same, or any part thereof, to either of them; that the various persons claiming the same ought to interplead touching their respective rights, in order that the plaintiff may be informed to whom the same ought to be paid; and that they and each of them ought to be restrained by the order and injunction of this honorable Court from commencing or prosecuting any suit at Law or in Equity against the plaintiff in respect to the matters aforesaid.

To the end, therefore, that the said possible heirs-at-law, Andreas Thorndike, *alias* Bayerl, and his guardian, the said J. G.; the said Anna Thorndike, *alias* Anna Bayerl; the said N. I. B., surviving executor of the will of the said Andrew Thorndike; the said I. T.; A. L.; E. B. and her husband, the said N. I. B.; the said S. E. M. and R. M. M.; the said E. A. T. and C. A. T.; the said M. A. B. and M. S. B.; E. T. T.; A. D. S. and E. de S.; and the said E. A. B., trustee \* for the said E. T. T. and A. D. S.; the said M. S. P. \* 2010 and R. T. P., and J. P., her trustee; and the said S. T. D., executor of the will of the said A. T., may full and direct answer make to all and singular the premises, the plaintiff waiving the benefit of answers upon oath, and may set forth their several and respective claims, or disclaim all interest in and right to the said sum of money, or any part thereof, and that such of them, if any, as claim adverse interests therein may be decreed to interplead together, and that it may be ascertained, in such manner as the Court shall direct, to which of them the said sum of money ought to be paid; and that the plaintiff may have leave to pay the same into Court, which he offers to do, for the benefit of such of the parties as shall be found or decreed to be entitled thereto; and that the said persons may, in the mean time, be restrained from commencing or prosecuting any suit at Law against the plaintiff in his said capacity, touching the said sum of money; and that he may have such other relief in the premises as the nature of the case may require.

May it please your honors to grant unto the plaintiff a writ of *subpœna*, directed to the said several persons last named, commanding them to be and appear before this honorable Court, at a certain time and place, to make answer in the premises, and abide the order and decree of the Court therein.

F. C. L., } *Solicitors for*  
A. D., } *Plaintiff.*  
2003

63. *Bill by an executor, in the nature of an interpleader to obtain instructions and advice of Court.*<sup>1</sup>

To the Honorable the Justices of the Supreme Judicial Court, sitting in Equity.

W. T. A., of B., in the county of S., Esquire, brings his complaint against S. B., of said B., widow, and J. G. B., of said B., single woman, and W. W. S., of said B., and Hester V. A., of M., in the State of New Jersey, wife of Henry V. A., physician, and said Henry and C. W., of the city and State of N. Y., and the said H. V. A., as trustee of said C.

And the plaintiff shows that on the twenty-sixth day of March, A. D. 1860, T. W., of said B., Esquire, made his last will and testament; that T. W. departed this life on the thirtieth day of said March; that on the thirtieth day of April, of the same year, the said will was admitted to probate, and letters testamentary issued to the plaintiff, the executor therein named.

2. That among other provisions of said last will and testament \* 2011 are \* these following, &c., as by reference to a certified copy of said will in Court to be produced will more fully appear.

3. That the real estate devised to the plaintiff, upon the trusts in said will recited, was, at the time of the decease of said T. W., subject to a mortgage for the sum of fifty-six hundred dollars and interest.

4. That the testator purchased said real estate of one S. R., and that it was conveyed to him by deed of said S. R., bearing date the second day of May, eighteen hundred and fifty-seven; that the consideration stated in said deed, and, as the plaintiff is informed and believes, the true consideration for the conveyance, was the sum of eighty-five hundred dollars; that after the description of the metes and bounds of the land in the said deed conveyed, the conveyance is declared to be subject to a mortgage of fifty-six hundred dollars and interest, and also subject to the taxes for 1857, said mortgage forming part of the consideration; that said mortgage is excepted from and taken out of the covenants of said deed, as by reference to a copy of said deed in Court to be produced will more fully appear.

5. That the mortgage referred to in said deed was given by said R. and one L. B. L. to J. V. K., to secure the promissory note of said L., for said sum of fifty-six hundred dollars.

6. That after the conveyance of said estate to the testator, the testator paid the interest upon said mortgage as it became due to the said J. V. K., the holder thereof; that the testator, as the plaintiff is informed and believes, was desirous of taking up the mortgage and substituting his own note therefor, and offered to the said J. V. K., the holder of the mortgage, so to do; but the said J. V. K. expressed a preference to let the matter remain as it then stood.

7. That the said S. B. and J. G. B. claim that said mortgage debt

<sup>1</sup> Andrews v. Bishop, 5 Allen, 490; Wheeler v. Perry, 18 N. H. 307; Deering v. Tucker, 55 Maine, 284; Kearney v. Macomb, 16 N. J. Eq. 189.

For form of decree in such case, see Wheeler v. Perry, 18 N. H. 307, 314.

is to be paid from the personal assets in the hands of the plaintiff, as executor.

8. That the said W. W. S. and others, residuary legatees, claim that the said real estate is devised to the plaintiff in trust for said S. B. and J. G. B., subject to the incumbrance of said mortgage, and that the plaintiff has no authority under said will to pay said mortgage debt.

9. And the plaintiff has no interest in the matter in controversy between the several defendants, but is advised that he cannot safely proceed in the matter without the direction and judgment of this Court sitting in Equity, having no adequate remedy at Law. Wherefore the plaintiff prays that the said several defendants may be decreed to interplead and state their several claims upon the plaintiff in the execution of his said trust as executor; so that the Court may adjudge whether a sufficient sum shall be taken from the assets of the estate in the hands of the plaintiff, to pay said mortgage debt and the interest thereon; or whether the same shall be paid to the defendants claiming under the residuary clause of said will.

\* To the end, therefore, that the said defendants may answer \* 2012 the premises, and that they may be decreed to interplead together; and that it may be ascertained by a decree of this honorable Court whether said mortgage debt shall be paid by the plaintiff from the assets of the testator in the hands of the plaintiff as executor; and that the plaintiff may have other needed relief in the premises;

May it please your honors to issue your writ of *subpœna*, directed to the several defendants, commanding them, and every of them, at a day certain, to appear before your honors, and then and there to answer all and singular the premises, and to stand to and abide such order and decree therein, as to your honors shall seem meet.

W. T. A.

(*Jurat.*)

## SECTION XX.

*Bills for Payment of Legacies,<sup>1</sup> and also to carry the Trusts of Wills into Execution.*

64. *Bill against an executor by the husband of a deceased legatee for payment of her legacy.*

To, &c.

Humbly complaining, sheweth unto your honors the plaintiff A. B., of, &c., that W. S., late of, &c., duly made and published his last will and testament in writing, bearing date on or about —, and thereby, amongst other bequests, gave to his nephews and nieces, the children of his late sister M. A., the sum of \$ — each, to be paid to them as they should respectively attain the age of twenty-one years, and

<sup>1</sup> See *Princeton v. Adams*, Executor, 10 decree in such case, see *Lupton v. Lupton*, 2 Cush. 129; *Gray v. Sherman*, 5 Allen, 198; *John. Ch.* 629.  
*Brown v. Brown*, 44 N. H. 231. For form of

appointed E. T. F., of, &c., the defendant hereinafter named, the sole executor of his said will, as in and by the said will, or the probate thereof, when produced will appear. And the plaintiff further sheweth that the said E. T. F., soon after the death of the said testator, duly proved the said will in the appropriate Court, and hath since possessed himself of the personal estate and effects of the said testator to an amount much more than sufficient for the payment of his just debts, funeral and testamentary expenses and legacies. And the plaintiff further sheweth that after the death of said testator, the plaintiff intermarried with A. A., who was the niece of the said testator, and one of the children of the said M. A., in the said will named, and by virtue

of said intermarriage the plaintiff, in right of his said wife, be-  
 \* 2013 came \* entitled to demand and receive the aforesaid bequest of \$ ——. And the plaintiff further sheweth that the plaintiff's said wife lived to attain her age of twenty-one years, and that she hath lately departed this life, and that neither the plaintiff nor his said wife received any part of the said legacy. And the plaintiff further sheweth, that, having obtained letters of administration to his said wife, he has repeatedly applied to the said E. T. F. for payment of the said legacy and interest thereon from the time of his said late wife's attaining her age of twenty-one years, and the plaintiff hoped that such, his reasonable requests, would have been complied with, as in justice and equity they ought to have done. BUT NOW SO IT IS, &c. TO THE END, therefore, that, &c.

And that an account may be taken of what is due and owing to the plaintiff for the principal and interest of the said legacy, and that the said defendant may be decreed to pay the same the plaintiff, and if the said defendant shall not admit assets of the said testator sufficient to answer the same, then that an account may be taken of the estate and effects of the said testator, which have been possessed or received by the said defendant, or by any other person by his order or to his use, and that the same may be applied in due course of administration. [And for further relief:] May it please your honors, &c.

65. *Bill on behalf of infant legatees entitled to a sum of stock standing in the names of the executors, praying to have a guardian appointed, maintenance allowed for the time past and to come, an account taken of the dividends retained by the executors, and to have the stock transferred into the Accountant-General's name.*

Humbly complaining, show unto your honors the plaintiffs E. H., J. H., T. H., and M. A. H., infants under the age of twenty-one years, by J. E., of, &c., their next friend, that E. H., the elder, late of, &c., but now deceased, duly made and published his last will and testament in writing, bearing date, &c., whereby he directed that W. T., of, &c., and E. B., of, &c., the defendants hereinafter named, and C. G., of, &c., who were the trustees and executors in his said will named, should, out of the moneys which should come to their hands in manner therein

mentioned, lay out and invest in or upon government or real securities at interest the sum of \$ — upon trust, &c. [*The trustees were to pay the dividends to E. H., the testator's wife, during her life or until her second marriage, and after her decease or second marriage, the whole of the dividends to be applied by the trustees for the maintenance and education of testator's grandchildren, the plaintiffs, to whom the principal was to be transferred, to the grandsons at twenty-one, and to the granddaughters at twenty-one or marriage*], as in and by, &c. And \* the \* 2014 plaintiffs further show that the said testator departed this life in or about the month of —, without having in any manner revoked or altered the said will, except by a codicil bearing date, &c., which did not relate to or affect the said trusts of the said sum of \$ —. And the plaintiffs further show unto your honors that W. T. and E. B. and the said C. G. duly proved the said testator's will, and acted in the trusts thereof, and out of the moneys which came to their hands from the estate and effects of the said testator, in or about, &c., appropriated the sum of £ —, in satisfaction of the aforesaid legacy in the purchase of the sum of £ — three per cent consolidated bank annuities, and the said sum of stock is now standing in their names in the books of the Governor and Company of the Bank of England. And the plaintiffs further show that the said C. G. has departed this life, and that the said E. H., on or about, &c., intermarried with and is now the wife of the said J. E., whereupon the interest of the said E. H., in the said sum of £ — three per cent consolidated bank annuities wholly ceased. And the plaintiffs further show that the said defendants paid to the said J. E. and E., his wife, the year's dividends which became due on the said sum of stock on the — day of —, as well for the interest of the said E. E. in the said stock as for the maintenance and education of the plaintiffs up to that time; but the said defendants have retained in their hands the subsequent dividends which accrued due on the said stock, and have made no payments or allowances thereout for the maintenance or education of the plaintiffs. And the plaintiffs further show that some proper person or persons ought to be appointed as the guardian or guardians of the plaintiffs, with suitable allowances for their maintenance and education for the time past since the said — day of —, and for the time to come, and that the said sum of stock ought to be secured in this honorable Court. To THE END, therefore, &c.

And that the said defendants may answer the premises, and that some proper person or persons may be appointed the guardian or guardians of the plaintiffs, with suitable allowances for their maintenance and education for the time past since the said — day of —, and for the time to come, and that the said defendants may account for the dividends of the said trust stock which have accrued due since the said — day of —, and may thereout pay the allowances which shall be made for the maintenance and education of the plaintiffs since the said — day of —, and may pay the residue thereof into this honorable Court for the benefit of the plaintiffs; and may also transfer the said sum of £ — three per cent consolidated bank annuities into the

name of the Accountant-General of this honorable Court, to be there secured for the benefit of the plaintiffs, and such other persons as may eventually be interested therein. [*And for further relief.*] May it please, &c.

\* 2015 \* 66. *Bill by the widow of a testator against the executors and trustees, claiming a share of the profits of a special partnership as a part of her annual income under the will.*

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

To the Honorable, the Justices of the Supreme Judicial Court, sitting in Equity.

Humbly complaining, sheweth unto your honors the plaintiff, A. M. K., of B., in the county of S., widow of D. M. K., late of N., in the county of M., merchant; — that the said D. M. K. departed this life on the twenty-second day of February, A. D. 1860, leaving a last will and testament, which, on the twenty-eighth day of March, A. D. 1860, was duly proved and allowed by the Court of Probate for the county of M; that in and by said last will he nominated and appointed as executors and trustees under the same, W. B. of B., in the county of S., J. B. L., also of said B., and G. G., of N., aforesaid; that the said J. B. L. declined to accept the said trust of executor or trustee, and letters testamentary were duly issued to the said W. B. and G. G., who accepted the said trust, and undertook and entered upon the execution of the same.

And the plaintiff further shows, that the said D. M. K., by his last will and testament, after certain specific charges and legacies therein set forth, devised and bequeathed the rest and residue of his estate in the terms and manner following, to wit: [*state the provisions of the will on which the question in dispute arises.*]

And the plaintiff further shows, that the two children of the said D. M. K. in said will mentioned, to wit; A. Moncrief K. and D. Malcom K., are minors, now residing in N. aforesaid, and that the plaintiff is their legal guardian.

And the plaintiff further shows, that, on or about the fourth day of September, A. D. 1858, the said D. M. K. became a special partner for the term of four years in the business of buying and selling dry goods with J. H., G. R. B., and J. T., merchants and copartners in B., aforesaid, under the name and firm of H., B., & T.; and the said D. M. K. contributed to the capital stock of said firm the sum of fifty thousand dollars, and by himself or his legal representative became entitled to receive a moiety of the net profits of the said partnership business; as by the written contract of partnership between the said H., B., & T. of the first part, and the said D. M. K. of the second part, bearing date the fourth day of September, A. D. 1858, and here in Court to be produced, and to which, for greater certainty, the plaintiff craves leave to refer, more fully appears. And the plaintiff avers, that said partner-



ship still continues in full force, and that the said executors and trustees have received therefrom, as the share of the net profits belonging \*to the estate of the said D. M. K., a very large sum \*2016 of money, to wit, forty thousand dollars.

And the plaintiff had well hoped that the said W. B. and G. G., executors and trustees, as aforesaid, would, upon the receipt from the said firm of H., B., & T. of a moiety of the net profits of their business, so as aforesaid to be paid to the said D. M. K. or his legal representative, pay over to the plaintiff the portion of the same, by the provisions of the will of the said D. M. K. directed to be paid over to her.

But now, so it is, that the said W. B. and G. G., though requested, do utterly refuse to pay over to the plaintiff any portion of the income derived by them from the said partnership business; but, on the contrary, do claim and pretend that the profits accruing to them as executors and trustees, by virtue of the interest of D. M. K. and his legal representatives in said partnership business, do belong to, &c., under the provisions of said will, are to be added to the principal fund of the residue of the estate of the said D. M. K., and are not to be added to, and do not form a part of, the income of said residue.

The contrary of all which the plaintiff charges to be true, and expressly claims and avers, that, under the provisions of the said will, the share of the net profits of said partnership business, belonging and accruing to the estate of said D. M. K., forms a portion of the income of the residue of said estate, and is to be added to all the other income arising from the residue of said estate, and that the whole amount thus made up constitutes the fund, of which, under the provisions of said will, after deducting charges and expenses, the plaintiff is annually entitled to receive one-third part, diminished only by the sum of seven hundred and fifty dollars, as directed in said will.

In consideration whereof, and because the plaintiff is entirely remediless in the premises according to the strict rules of the Common Law, and can only have relief in a Court of Equity, where matters of this nature are properly cognizable and relieviable.

To the end, therefore, that the said defendants W. B. and G. G. and the said minor children, A. Monerief K. and D. Malecom K., by a guardian for this suit, which the plaintiff prays the honorable Court to appoint, may, upon their several and respective corporal oaths, full, true, direct, and perfect answer make to all and singular the premises, as fully in every respect as if the same were here repeated, and they thereunto particularly interrogated, according to the best of their respective knowledge, information, and belief; and that it may be determined by the judgment of this honorable Court whether, under the will of the said D. M. K. the share of the net profits of the business of the firm of H., B., & T. belonging to the estate of the said D. M. K. is and is to be taken as a part of the income, or as part of the principal fund of the residue of the estate of the said D. M. K.; and that, if it shall appear that such share of the profits of the said partnership \*business \*2017 constitutes and forms a part of the income of said residue, the

aforesaid defendants, W. B. and G. G., executors and trustees under said will, and their successors in said trust, may be ordered and decreed to account with the plaintiff for the profits of said partnership business, and pay over to the plaintiff such a proportion thereof as she is entitled to, under the provisions of the will of the said D. M. K.; and that the plaintiff may have such other and further relief as the nature of her case may require, and to your honors may seem meet.

May it please your honors to grant unto the plaintiff a writ of *subpoena*, to be directed to the said W. B., G. G., A. Moncrief K. and D. Malcom K., thereby commanding them, and every of them, at a certain day and under a certain penalty therein to be specified, personally to appear before your honors in this honorable Court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet, and the plaintiff will ever pray.

A. M. K.

## SECTION XXI.

### *Bills relating to Trusts.*

67. *Bill by an executor and trustee under a will, to carry the trusts thereof into execution.*

To, &c.

Humbly complaining, shows unto your honors the plaintiff C. R., of, &c., executor of the will and codicils of M. S., late of, &c., deceased, and also a trustee, devisee, and legatee named in said will and codicils, against J. G., of, &c., &c., and E. his wife, and B. S., of, &c., &c., and J. S. G., of, &c., &c., that the said M. S. at the several times of making her will and codicils hereinafter mentioned, and at the time of her death was seised or entitled in fee-simple of or to divers messuages, lands, &c., of considerable yearly value, in the several counties of C. and D., and being so seised or entitled, and also possessed of considerable personal estate, the said M. S., on or about —, made her last will and testament in writing, and which was duly signed and attested, and published by her, according to law, and thereby, after giving divers pecuniary and specific legacies and divers annuities, the said testatrix gave and devised unto the plaintiff all, &c. [*stating the substance of the will*]. And the said testatrix afterwards, on or about —, made a codicil to her said will, which was duly signed, attested, and published, according to law, and thereby gave, &c., and in all other respects she thereby confirmed her said will and all other codicils by her  
 \* 2018 theretofore \* made; as by said will and the said several codicils thereto or the probate thereof, to which the plaintiff craves leave to refer, when produced, will appear. And the plaintiff further shows that the said testatrix M. S. departed this life on or about —, without having revoked or altered her said will and codicils, save as such will is revoked or altered by the said codicils, and as some of the said codicils have been revoked or altered by some or one of such subsequent codi-

cils; and the said testatrix at her death left the said E. G., formerly E. S., and the said B. S. her cousins and coheirresses-at-law. And the plaintiff being by the said codicil of the — day of —, appointed sole executor of the said will and codicils, has since her death, duly proved the said will and codicils in the proper Court, and taken upon himself the execution thereof. And the plaintiff further shows that the said testatrix, at the time of her death, was possessed of, interested in, and entitled unto considerable personal estate and effects, and amongst other things, she was entitled to an eighth share and interest in a certain copartnership trade or business of a tin-blower and tin-melter, which was carried on by the testatrix and certain other persons, at —, under the firm of S. F. & Co., in which the testatrix had some share of the capital, and which was a profitable business, and by the articles of copartnership under which the said business was carried on, the plaintiff, as the said testatrix's personal representative, is now entitled to be concerned in such share of the said business for the benefit of the said testatrix's estate; and she was also possessed of or entitled to certain leasehold estates held by her for the remainder of certain long terms, &c. And the plaintiff further shows that he has possessed himself of some parts of the testatrix's personal estate, and has discharged her funeral expenses, and some of her debts and legacies, and the plaintiff has also, so far as he has been able, entered into possession of the said testatrix's estates, which she was seised of, or entitled to, at the times when she made her said will and codicils, and which consisted of, &c., being all together of the yearly value of \$ —, or thereabouts, besides the said mansion-house, and besides the premises, which, by the said codicil, dated on — day of —, are devised to the plaintiff for his own use and benefit; and the plaintiff is desirous of applying the said testatrix's personal estate and effects, not specifically bequeathed, in payment of the said testatrix's debts, and of her legacies now remaining unpaid, and of the annuities bequeathed by the said will and codicils, so far as the same will extend, and of paying the remainder thereof out of the rents and profits of the said real estates, and of applying the whole of the rents and profits, according to the directions of the said will and codicils, as in justice and equity ought to be the case. But now so it is, may it please your honors, that the said J. G., and E. his wife, B. S., and J. S. G., in concert with each other, make various objections to the plaintiff's applying the said \* personal estate, \* 2019 and the rents and profits of the said real estate, according to the directions of the said will and codicil; and the said defendants J. G. and E. his wife sometimes pretend, that by virtue of the said testatrix's will, they are entitled to the residue of the said testatrix's personal estate, not specifically bequeathed, including all her household estates, after payment of all her funeral expenses and debts, and that the said personal estate is not subject to the payment of the several legacies and annuities given by the testatrix's said will and codicils, but is exempt therefrom, and that all the said legacies and annuities ought to be paid out of the rents and profits of the said testatrix's real estates. Whereas the plaintiff charges the contrary of such pretences to be true, and that

the said personal estate is applicable to the payment of all the said testatrix's legacies and annuities, after satisfying all her funeral expenses and debts; and the said J. G. and E. his wife are desirous that the plaintiff, as the personal representative of the said testatrix, should, by means of the said testatrix's share of the capital employed in the said trade or business, carry on the said trade or business for the benefit of them and of the said testatrix's estate, but which the plaintiff cannot safely do without the direction and indemnity of this Court; and the said J. G. alleges that he is not of ability to maintain and educate his said son J. S. G., who is an infant of the age of ten years or thereabouts, and he therefore claims to have some part of the rents and profits of the said premises paid to him, for the maintenance and education of the said J. S. G.; and the plaintiff, under the circumstances aforesaid, is unable to administer the said personal estate, and to execute the trusts of the said real estates, without the directions of this honorable Court, and the defendants are desirous of having a person appointed by this Court to receive the rents and profits of the said real estates devised as aforesaid by the said fifth codicil, to which the plaintiff has no objection. In consideration whereof, &c. To THE END, therefore, &c.

And that the trusts of said will and codicil may be performed and carried into execution by and under the direction of this Court, and that an account may be taken of the said testatrix's personal estate and effects, not specifically bequeathed, and of her funeral expenses and debts, and of the legacies and annuities bequeathed by the said will and codicils, the plaintiff being ready and hereby offering to account for all such parts of the said personal estate as have been possessed by him, and that the said personal estate may be applied in payment of the said funeral expenses, debts, and legacies and annuities in a due course of administration, and that the clear residue, if any, of the said personal estate may be ascertained and paid to the said defendants J. G. and E. his wife, in her right; and in case it shall appear that the said personal estate, not specifically bequeathed, is not sufficient for payment of all the said funeral expenses, debts, legacies, and

\* 2020 \* annuities, or that any parts thereof are not payable out of such personal estate, then that proper directions may be given for payment of such deficiency, or of such parts thereof as are not payable out of the said personal estate, according to the trusts of the said term of one hundred years, vested in the plaintiff as aforesaid and that an account may be taken of the rents and profits of the said real estates, comprised in the said term received by or come to the hands of the plaintiff, and that the same may be applied according to the trusts of the said term; and that proper directions may be given touching the effects specifically bequeathed by the said will and codicils as heirlooms, and that proper inventories may be made thereof; and that all necessary directions may be given touching the application of a sufficient part of the rents and profits of the said real estates to the maintenance and education of the said J. G. S., in case this Court shall be of opinion that any allowance ought to be made for that pur-

pose; and that a proper person may be appointed by this honorable Court to receive the rents and profits of the said real estates devised as aforesaid by the said fifth codicil. [*And for further relief.*] May it please, &c.

*Pray subpoena against J. G. and E. his wife, B. S., and J. S. G.*

68. *Prayer in a bill against executors and residuary legatees, the latter having raised a question of satisfaction. [Modern English Form.]*

1. That it may be declared that the aforesaid advance and settlements of the sum of £—— bank £3 per cent annuities, made on the marriage of the said M. C. with the said J. D. W., was not an ademption or satisfaction of the legacy of £30,000 like annuities given by the said will of the said testator in favor of the said M. C. and her issue, or of the residuary bequest also made by the said will in favor of the said M. C. and her issue.

2. That it may be declared, that the plaintiffs are entitled to have a sum of £30,000 bank £3 per cent annuities set apart out of the personal estate of the said testator to answer the bequest contained in the said will of £30,000 bank £3 per cent annuities in favor of the said M. C. and her issue, and that the said executors may be directed to set apart and transfer the same accordingly.

3. That it may also be declared, that the plaintiffs are entitled to have one equal eighth part of the residuary personal estate of the said testator set apart and duly invested upon and for the same trusts, interests, and purposes as are expressed by the said will of and concerning the last-mentioned sum of £30,000, &c.

4. That proper accounts and inquiries may, if necessary, be directed for the purpose of ascertaining the clear residue of the personal estate of the said testator, and the one equal eighth part thereof may be set apart and invested accordingly.

5. [*For further relief.*]

\* 69. *Bill to obtain reimbursement out of an estate, to the children \* 2021 of a testator who had by his will directed certain portions of said estate to be sold for the payment of debts and legacies, but which debts and legacies had, in whole or in part, been paid out of the income of the estate, which income had been devised to said children.*<sup>1</sup>

F. A., of B., in the county of S., gentleman, G. W. A., of E., in the State of I., gentleman, C. G. L., of said B., Esquire, and Cornelia, his wife, bring this their bill of complaint against J. A. L., of said B., Esquire, as he is executor of and trustee under the will of F. A., late of M., in the county of N., gentleman, deceased.

And thereupon the plaintiffs allege that the said F. A., late of M. aforesaid, departed this life, testate, having made a will and three codicils, copies of which are filed herewith, and which were duly admitted to probate in said county of N., in and whereby, besides divers other

<sup>1</sup> *Amory v. Lowell*, 1 Allen, 504.

provisions, he gave and devised all the rest and residue of his estates to the said J. A. L., and to H. C., G. A. G., and his son, the said F. A., in trust for the benefit of his children, the plaintiffs, the said F. A., G. W. A., and Cornelia, during their respective lives, to collect and receive the income thereof, and after deducting expenses, to divide the surplus equally between them, and upon the death of any of them to pay his or her share thereof during the life of the survivors and survivor, in such manner as the *cestui que trust* so dying should direct by will, and in default thereof as the plaintiffs understand and are advised, to the children of such *cestui que trust*, and in default thereof, to the survivors and survivor. And upon the further trust upon the decease of the last survivor to divide and distribute the trust estates in equal shares to and among all the children of the plaintiffs, share and share alike; provided, always, that if the said *cestui que trusts*, or any of them, should have disposed of his or her interest in the reversion of the estates by will, such disposal should be observed and followed.

The plaintiffs further show, that the said H. C., F. A., and G. A. G. declined the said trust, and that the said J. A. L. accepted, and has since administered the same.

The plaintiffs further show that the said testator appointed the said J. A. L., H. C., F. A., and G. A. G. to be the executors of his said will, and that all of them except the said J. A. L. declined the trust, and that he accepted the same, and was duly appointed and qualified and has administered the said estate.

The plaintiffs further show, that at the time of his decease the said testator was possessed of divers real and personal estates of great value and was indebted to divers persons in large sums of money, and \* 2022 that \* in and by his said will he directed that all his just debts should be first paid, and afterwards directed the said executors, their survivors or any administrator to sell and convey a certain parcel of land, situate at the corner of H. and C. Street in said B., and another parcel situate in M. Place, near W. Street, and to apply the proceeds to the payment of his debts; and if the amount derived therefrom should not be sufficient to pay the same, then for the same purpose to sell any other real estate situate in said B. of which he should die seised.

The plaintiffs, the said F. A. and G. W. A. and the said Cornelia, further show that the personal estate of which the said testator was possessed was small in value and wholly insufficient to pay his debts and legacies, and that his real estate by reason thereof, as well as by the contents of his said will, became charged with the payment thereof, — and in the usual course of administration, as well as by the express directions of the testator, should have been sold and the proceeds applied in payment thereof, and the residue held in trust during the lives of the plaintiffs, the said F. A., G. W. A., and Cornelia, and their survivors.

That at the testator's decease his debts amounted to about sixty thousand dollars, and the legacies bequeathed to seventeen thousand dollars; and that the appraised value of the estates directed to be first sold in order to obtain the means for payment thereof was, as appears by the

appraisement, in the aggregate, the sum of seventy-eight thousand dollars.

The said plaintiffs further allege, that the said J. A. L., the sole acting executor and trustee, was nearly related to them, and that they had unlimited confidence in his friendship, integrity, and financial ability and discretion, and that he, as their official adviser and friend, advising with them upon the best course to be taken for their own immediate and future interests, and for the protection of the interests of those who should be entitled to the estates of the testator after their decease, was of opinion that the same could be leased to advantage, and might be expected to increase much in value; and that it would conduce to their interest and that of their children, that the same should not be sold at that time, but be leased, and that a portion of the income should be applied to the payment of the principal and interest of the debts due and chargeable upon the said estates, as well as by express liens or mortgages existing thereon as by the operation of law and the will of the testator.

That the said plaintiffs, relying upon the said representations, consented thereto, and that the said J. A. L. thereupon and since has leased the said estates, and has received the income thereof, and has applied the same to the payment of the said debts and the interest thereon, until the same are quite or nearly paid and satisfied, and has also paid a part thereof to the plaintiffs.

\* That the representations and expectations of the said J. A. L. \* 2023 and the said plaintiffs have been more than realized, and that the said real estates have increased in value by a much larger degree than was anticipated, whereby the interest of those who will be entitled to the same in remainder have been very largely promoted.

That the consent of the plaintiffs to such appropriation of the income was not given for any definite time, nor was any agreement made or stipulation entered into on either side, to deprive them of their rights to have recourse to the said estates for repayment of the sums so appropriated, whenever the said estates could be sold to advantage, and that by reason of the appropriation of the said income to the payment of the debts of the said estate, they have become subrogated to the rights of the original creditors, and are entitled to have the real estates directed by the said testator to be disposed of for that purpose now sold and the proceeds applied in payment of the sums so advanced and paid out of the income to which they were entitled as equitable tenants for life, or to have such reimbursements out of the proceeds of others of the estates of the testator, which may be more advantageously disposed of.

That the said estates which the testator directed to be sold for the payment of his debts, so much thereof as is necessary for that purpose, and certain other of the estates of which he died seised, can now be sold to great advantage and for very large prices, compared to their value at the time of the decease of the testator, and that the same ought now to be sold, and the proceeds applied to the payment of any debts not already paid and satisfied, and to the payment of the sums due to them respectively, on account of the appropriation of their income to the payment

of debts, the amount of which the plaintiffs are unable to set forth of their own knowledge.

That the plaintiffs have requested the said J. A. L. to cease from appropriating the income of the said real estates to the payment of the debts and legacies of the testator, and to pay it to them; and also to sell the said estates directed to be sold for the payment of debts, or so much thereof as may be necessary, and to apply the proceeds to the payment of the debts and legacies remaining unpaid, and to the payment to the plaintiffs of the sums due to them as aforesaid with interest, and to render an account of all his receipts, payments, and doings, to the end that it may appear what sums of money belonging to the plaintiffs have been heretofore applied in payment of the said debts and legacies.

And the plaintiffs well hoped that the said J. A. L. would comply with such reasonable request.

But now so it is, may it please your honors, that the said J. A. L., though admitting the equitable rights of the plaintiffs, and that they are justly entitled to be reimbursed for so much of their income as  
\* 2024 \* has been applied to the payment of the said debt sand legacies, objects that he cannot now proceed to sell the said real estate, and to apply the proceeds without the direction of this most honorable Court, and the protection which a decree thereof would give to him; and sometimes that the power to sell was given to four executors, of whom only one accepted the trust, and that it is doubtful whether he has the power to sell and convey a good title; and sometimes that as trustee he is merely a tenant for life during the lives of the said F. A., G. W. A., and Cornelia, and their survivors, without power to sell and convey a fee; and that if he should undertake so to do, there would be difficulty and embarrassments in making a title, by which the value of the said estate would be depreciated, unless a sale thereof was made under a decree of some competent Court.

And the plaintiffs, insisting that their rights in the premises are clear and indisputable, admit that the said J. A. L. may reasonably claim the benefit and protection of a decree in the premises before proceeding to sell the said estates; and insisting that his right to sell as executor is indisputable, inasmuch as the power, though given to four, was directed to be exercised by their survivor or whoever should administer the estate, and also that he is duly empowered to sell as trustee, because by virtue of the duties imposed upon him as trustee he necessarily holds an estate in fee, yet admit that it would be for the interest of all concerned, and might prevent embarrassment and loss, if the said estates were sold under the order and direction of this honorable Court.

To the end, therefore, that the said J. A. L. may be ordered to render an account of all the real and personal estates received and administered by him, and of the application thereof, and of the sums of money received from the rents of said real estate and from other sources, and of the expenditure thereof, and of how much of the income thereof belonging to the plaintiffs has been applied to the payment of debts and legacies, and that he may set forth and discover what estates are now held by him as executor or trustee, and generally may make answer in the premises,



and may especially set forth what was the value of the several parcels of real estate owned by the said testator at the time of his decease, and at what prices the same could now be sold, and whether any permanent improvements have been made thereon, and if so, of what nature, and to what extent and cost; and that he may be ordered to sell the said estates directed to be sold by the testator or such other estates as may to the Court seem desirable, or so much thereof as may be necessary to pay all debts and legacies remaining unpaid, together with such sums of money with interest as may be justly due to the plaintiffs for so much of the income belonging to them as has been applied to the payment of debts and legacies, or expended for permanent improvements, and he may set forth and discover \* whether the plaintiffs, or any or \* 2025 either of them, ever agreed or consented that all of the said debts and legacies should be paid out of the said rents, without their being substituted in the place of the creditors, or to waive their rights to require the said estates to be sold whenever deemed expedient; and that the plaintiffs may have such further and other relief in the premises as the nature of the case may require; and that such order and decree may be passed as will give adequate protection to the said J. A. L., and insure a good title to any purchaser.

May it please your honors, &c. [*Pray subpoena.*]

F. C. L., *Solicitor for Plaintiffs.*

70. *Bill by administrator to have certain testamentary papers declared void for want of due execution and authentication, and to obtain the property of the deceased from the person in whose custody it was left for disposition according to said testamentary papers.*<sup>1</sup>

To the Judges of the Circuit Court of the United States within and for the District of Massachusetts, sitting in Equity.

T. C. G., a subject of her Britannic Majesty, and now her Britannic Majesty's consul at the port of B., as administrator of the goods and estate of the late Sir J. C., Baronet, intestate, brings this his bill against W. A., of the city of B., and district aforesaid, merchant, and Jacob H. H., of L., in the said district, and his wife, Julia H. H., of the said L., all of the said defendants being citizens of the Commonwealth of Massachusetts. And thereupon your orator complains and says, that Sir J. C. died at the city of B. on or about the eighth day of October, A. D. 1842, and that your orator on the twenty-second day of April, A. D. 1844, was duly appointed administrator of the estate of the said Sir J. C., within the Commonwealth aforesaid, and has given bonds according to law for the faithful performance of his duties as such. That on or about the twenty-first day of April, A. D. 1841, the said Sir J. C. assigned to the said W. A. twenty shares in the Nashua Manufacturing Company, and at the same time received from the said W. A. seven thousand dollars as an advance on account of the said shares. That on

<sup>1</sup> Grattan v. Appleton, 3 Story, 755

or about the same time the said Sir J. C. addressed to the said W. A. a letter of instructions with regard to the said shares, which was duly received by the said W. A., in the following words: [*Recite contents of letter.*]

That on or about the fourteenth day of January, A. D. 1842, the said Sir J. C. addressed to the said W. A. a letter which was duly received by the said W. A., in the following words: [*Recite contents of letter.*]

That the said letter enclosed the two following letters: [*Recite contents of letters.*]

That the last letter was sealed and indorsed as follows: "W. \* 2026 A., \* Esq., is requested to take charge of this packet in his safe until he either sees or hears from Sir J. C., or receives authentic intelligence of his death, when Sir J. C. begs he will be so good as to open it and comply with the request therein contained. Boston, 14th February, 1842."

That at some time after the death of the said Sir J. C., the said W. A. opened the said letter and the several enclosures therein. And your orator further says, that the several sums of money, amounting in all to a large sum, to wit, three thousand dollars, which the said W. A. had in his possession at the time of the death of the said Sir J. C. and belonging to the said Sir J. C., rightly belong to your orator as administrator of his estate, and that the said W. A. is justly bound to pay the same to your orator, with interest thereon for their detention. And your orator well hoped that the said W. A. would pay the same, but the said W. A. pretends that he cannot with safety pay the same, on account of certain pretended claims made in pursuance of the letters hereinbefore recited by the said Jacob H. H. and his said wife, and also by one E. J., of Bologne, near London, in the Kingdom of Great Britain and Ireland, spinster, a person out of the jurisdiction of the Court, and on this account alone not a party to this bill, and under this pretence, though often requested, the said W. A. refuses to pay the same.

To the end, therefore, that the said W. A., Jacob H. H., and Julia H. H., and also E. J., if she shall come within the jurisdiction of the Court, may respectively full and perfect answer make upon their respective corporal oaths, according to their respective knowledge, information, and belief, to all and singular the matters and charges aforesaid, and that as fully as if the same were here repeated, and they hereto particularly interrogated. And that the said W. A. may set forth an account of all and every sum and sums of money, or of any personal estate received by him, or by any person by his order, from the said Sir J. C., and how the same have respectively been applied or disposed of, and whether any and what part of the same now remains unapplied or undisposed of, and that, upon a full and fair disclosure of the several matters aforesaid, the said W. A. may be decreed to pay to your orator the said sum of three thousand dollars with interest thereon, for the unjust detention thereof, that the said pretended claims of the said Jacob H. H. and wife, and of the said E. J., may be decreed to be without force and virtue; and that your orator may have such further relief in the premises as the nature of the case may require, and as may be

agreeable to equity and good conscience. May it please your honors,  
&c. T. C. G.

[*Pray subpoena against W. A., J. H. H. and wife, and E. J., "if she shall come within the jurisdiction of the Court."*]

G. S. H., *Solicitor*.

\* SECTION XXII.

\* 2027

*Bills for Partition.*<sup>1</sup>

71. *Bill by coheiresses and their husbands for a partition of freehold estates.*

To, &c.

Humbly complaining, show unto your honors the plaintiffs, T. K., of, &c., and C. his wife, L. G., of —, and M. his wife, and J. V., of, &c., widow, that W. S., of, &c., deceased, the late father of the plaintiffs, C. K., M. G., and J. V., and also E. F., wife of R. F., of, &c., the defendants hereinafter named, was in his lifetime, and at the time of his death, seised in fee-simple or of some other good estate of inheritance to him and his heirs, of and in all that messuage or dwelling-house, &c., and also of and in all that other messuage, &c.; all which said messuages, lands, and premises are situate, lying, and being in, &c., and being so seised, he, the said W. S., did many years since depart this life, intestate, leaving M. S., his wife, and the said C. K., M. G., and J. V., and their sister E. F., his four daughters and only children, and coheiresses him surviving; and upon his death the said messuages, &c., and premises descended upon and came to the said C. K., M. G., and J. V., and the said E. F., as such coheiresses, subject only to the dower of their said mother, M. S. And the plaintiffs further show unto your honors, that the said M. S., the widow and relict of the said W. S., departed this life some time in or about the month of —, whereupon the plaintiffs, T. K. and C. his wife, and L. G. and M. his wife, in right of the said C. and M. and also said J. V., and the said R. F. and E. his wife, in right of the said E., have ever since been, and now are, severally seised in fee of and in the said messuages, &c., and premises in four equal undivided parts or shares as tenants in coparcenary. And the plaintiffs further show, that they have frequently applied unto and requested the said R. F. and E. his wife to join and concur with the

<sup>1</sup> A petition for partition is in the nature of a bill in Equity. *Nesmith v. Dinsmore*, 17 N. H. 515. The U. S. Circuit Courts, sitting as Courts of Equity, have jurisdiction to partition land. *Daniels v. Benedict*, 50 Fed. Rep. 347. A reversioner or remainder-man cannot compel partition during the continuance of the particular estate. *Merritt v. Hughes*, 36 W. Va. 356. The owner of an equitable title may maintain a suit for partition. *Watson v. Sutro*, 86 Cal. 500. Upon partition, tenants in

common take their shares by descent, and not by purchase. *Harrison v. Ray*, 108 N. C. 215. In Equity, as at Law, a pending lease for years is not an obstacle to partition between the owners of the fee. *Willard v. Willard*, 145 U. S. 116. A bill in Equity cannot be maintained in Massachusetts by a tenant in common against his co-tenants for partition of a house and land. *Whiting v. Whiting*, 15 Gray. 503; *Hodges v. Pingree*, 10 Gray, 14; see *ante*, p. 1150.

plaintiffs in making a fair, just, and equal partition of the said premises between them, in order that their respective shares and proportions thereof may be allotted, held, and enjoyed in severalty. And the plaintiffs well hoped that the said R. F. and E. his wife would have complied with such their reasonable requests, as in justice and equity they ought to have done. But now so it is, &c., &c., they, the said defendants, absolutely refuse to comply with such the plaintiffs' reasonable requests as aforesaid, pretending that the plaintiffs and the \* 2028 said \* defendants have ever since the death of the said W. S. and M. S. respectively, their said father and mother, deceased, constantly and regularly divided the yearly rents and profits of all the said messuages, &c., and premises equally between them, and that it will not be to the benefit or advantage of either of them to make an actual partition thereof. Whereas the plaintiffs charge, and so the truth is, that a fair, just, and equal partition of the said premises will tend greatly to the benefit and advantage of the plaintiffs and the said defendants, but they, the said defendants, under divers frivolous pretences, absolutely refuse to join or concur with the plaintiffs therein. All which actings, &c.

And that a commission of partition may be issued out of and under the seal of this honorable Court, and directed to certain commissioners therein named, to divide and allot the said messuages, &c., and premises in equal fourth parts or shares; and that one full and equal fourth part or share may be allotted and conveyed unto the plaintiffs T. K. and C. his wife, and the heirs and assigns of the plaintiff C. K.; that one other full and equal fourth part or share may be allotted and conveyed unto the plaintiff L. G. and M. his wife, and the heirs and assigns of the plaintiff M. G.; and that one other full and equal fourth part or share may be allotted and conveyed unto the plaintiff J. V., her heirs and assigns; and that the plaintiffs T. K. and C. his wife, L. G. and M. his wife, and J. V., may severally hold and enjoy their respective allotments of the said premises according to the natures thereof in severalty; and that all proper and necessary conveyances and assurances may be executed for carrying such partition into effect, &c. May it please, &c.

### SECTION XXIII.

#### *Bills for the Appointment of New Trustees.*<sup>1</sup>

72. *Bill to remove trustees, one refusing to act and the other a prisoner for debt, having applied part of the trust moneys to his own use. Prayer for an account, and for an injunction to restrain them from any further interference,—also for a reference to a Master to appoint new trustees, and for a Receiver.*

Humbly complaining, show unto your honors the plaintiffs, J. E., of, &c., and S. his wife, and S. E. the younger, spinster, the daughter and only

<sup>1</sup> See Abbott, Adm'r, Pet. 55 Maine, 580.

child of said J. E. and S. his wife, that by indenture bearing date —, and made between said J. E. and S. his wife of the one \* part, \* 2029 and N. B., of, &c., and R. P., late of, &c., but now a prisoner in the jail of —, the defendants hereinafter named, of the other part, after reciting that, &c. [*stating the indenture*], as by the said will to which your orator and oratrixes crave leave to refer when produced will appear. And the plaintiffs further show unto your honors, that the said R. P. has principally acted in the trusts of the said indenture, and has, by virtue thereof, from time to time received considerable sums of money and other effects, but the said R. P. has applied only a small part thereof upon the trusts of the said indenture, and has applied and converted the residue thereof to his own use, and in particular the said R. P. has within a few months past received a considerable sum from the estate and effects of the said C. E., the whole of which he has applied to his own use. And the plaintiffs further show that they have by themselves and their agents repeatedly applied to the said R. P. and N. B. for an account of the trust property received and possessed by them, and of their application thereof. And the plaintiffs well hoped that the said defendants would have complied with such their reasonable requests, as in justice and equity they ought to have done. But now so it is, &c. And the said defendants pretend that the trust property and effects possessed and received by them were to an inconsiderable amount, and that they have duly applied the same upon the trusts of the aforesaid indenture. Whereas the plaintiffs charge the contrary of such pretences to be the truth, and that so it would appear if the said defendants would set forth, as they ought to do, a full and true account of all and every the said trust property and effects which they have respectively possessed and received, and of their application thereof. And the plaintiffs charge that the said R. P. threatens and intends to use other parts of the said trust property, and to apply the same to his own use, unless he is restrained therefrom by the injunction of this honorable Court. And the plaintiffs further charge that he, as well as the said N. B., ought to be removed from being trustees under the said indenture, and that some other persons ought to be appointed by this honorable Court as such trustees in their place and stead, and that in the mean time some proper person ought to be appointed to receive and collect the said trust property. All which actings, &c.

And that the said defendants may answer the premises, and that an account may be taken of all and every the said trust property and effects which have, or but for the wilful default or neglect of the said defendants might have been received by them or either of them, or by any other person or persons by their or either of their order, or to their or either of their use; and also on account of their application thereof; and that the said defendants may respectively be decreed to pay what shall appear to be due from them on such account; and that the said defendants may be removed from being trustees under the said indenture, \* and that it may be referred to one of the Masters \* 2030 of this honorable Court to appoint two other persons to be the

trustees under the said indenture in their place and stead, and that in the mean time some proper person may be appointed to receive and collect the said trust estate and effects, and that the said defendants may be restrained by the order and injunction of this honorable Court from any further interference therein. [*And for further relief.*] May it please, &c.

73. *Bill for the appointment of a new trustee under a marriage settlement, in the room of one desirous to be discharged, there being no such power therein contained.*<sup>1</sup>

Humbly complaining, show unto your honors the plaintiffs, J. M. P., of, &c., and E. his wife, and A. P. and C. P., infants under the age of twenty-one years, by the said J. M. P., their father and next friend, and S. N. M., of, &c. [*the other trustees under the settlement*], that by certain indentures of lease and release bearing date respectively, &c., the release being of three parts, and made or expressed to be made between, &c. [*stating the indenture of release*]. But the said indenture of release contained no power or authority to appoint a new trustee in the place or stead of either of the said trustees therein named, who should decline to act in the said trusts, or be desirous to be removed therefrom; as in and by the said indentures, &c. And the plaintiffs further show unto your honors, that the said intended marriage was soon afterwards had and solemnized between the plaintiff J. M. P., and the plaintiff E. P.; and that the plaintiffs A. P. and C. P. are the only children of the said marriage. And the plaintiffs further show, that the said defendant I. P. L. declines to act in the trusts of the said indenture, and is desirous to be discharged therefrom, but by reason that no power is reserved in the said indenture for the appointment of a new trustee, the plaintiffs are advised that he cannot be discharged from such trusts, nor any new trustee appointed without the aid of this honorable Court. *To the end*, therefore, that the said defendant I. P. L. may upon his corporal oath, &c.

And that the said defendants may answer the premises, and that it may be referred to one of the masters of this honorable Court to appoint a new trustee under the said marriage settlement, in the place and stead of the said defendant; and that the said defendant may be directed to join in such instrument or instruments as may be necessary \* for conveying or releasing the said trust premises to your orator, S. N. M., and such new trustee upon the trust of the said settlement; and that thereupon the said defendant may be

<sup>1</sup> See *Bowditch v. Banuelos*, 1 Gray, 220. Where no trustees were named in a will, in which was a bequest of a certain sum to "the Universalist Religious Denomination in the county of Berkshire, as a permanent fund, the use to be applied annually for the support of that denomination," it was held, that a Court

of Equity would appoint trustees to execute the trust, on a bill filed by the organized Universalist societies of the county. First Universalist Society in North Adams and others v. William Fitch and another, Administrators, 8 Gray, 421.

discharged from the trusts of the said indenture. [*And for further relief.*] May it please, &c.

74. *Petition for discharge as trustee, and transfer of trust property to new trustee.*<sup>1</sup>

To the Honorable the Justices of the Supreme Judicial Court.

Respectfully show the petition of J. I. B., of B., in the county of S., Esquire, that by force of an indenture recorded with Suffolk Deeds in Lib. 627, fol. 291, he was substituted in the place and stead of E. A. B., Esquire, to be trustee under two certain indentures made by M. A. T., of said B., single woman, and recorded respectively with Suffolk Deeds in Lib. 574, fol. 229, and Lib. 618, fol. 186; that as such trustee he holds certain real estate in said B., and also certain personal property upon the trusts set forth in said two original indentures, all which said indentures are herewith submitted to the Court, that after making said two original indentures, said M. A. T. intermarried with and is now wife of C. M. de los S. B., Secretary of Legation to her Catholic Majesty the Queen of Spain, and now resident at W., in the District of C.; that there is no person, to the knowledge of the petitioner, interested in said trust property and estate except said C. M. de los S. B. and M. A. his wife; that, in the event of the death of said M. A. without children, and without having exercised the power of appointment given her by said indenture, her collateral relations, who would then be her heirs-at-law, may become interested therein; that she has now living a mother and three sisters, viz., M. M. B., wife of E. A. B., aforesaid, now residing in said B.; A. T., single woman, a member of the family of said E. A. B., and also residing in said B.; E. F. R., wife of H. G. R., junior, of B., in the State of M.; and E. T. R., being now commorant at said B., in the family of said E. A. B.; and M. S. P., a minor, wife of R. T. P., Esquire, both now absent in Europe, said R. T. P. having been late a resident in said B.; that said M. A. has requested the petitioner to transfer said trust property and estates to a new trustee, and he is desirous so to do.

Wherefore the petitioner prays the honorable Court that due notice may be ordered to all persons, and that he may be discharged from said trust, and that such order and decree may be passed as to the appointment of a new trustee, either with or without bonds for the faithful performance of said trust, and as to the conveyance and transfer of said trust property and estates as to the Court may seem just \* and equitable, to the end that the petitioner, complying with \* 2032 and fulfilling said order and decree on his part, may be as fully and effectually released and discharged from all liability in the premises as if he had never assumed said trust. And as in duty bound will ever pray.

J. I. B.

B., April 13, 1852.

<sup>1</sup> Bowditch v. Banuelos, 1 Gray, 220.

## SECTION XXIV.

*Bills by Underwriters in Respect of Frauds practised upon them in the Insurance of Ships.*

75. *Bill by underwriters for a fraud practised upon them in the representation of the voyage. Prayer for an injunction to restrain the defendants from proceeding at Law, and for a commission to examine witnesses abroad.*

States that W. W., of, &c., alone or jointly with some other persons, was or were, or pretended to be, before and at the time of making the insurance after mentioned, owner or owners of a certain ship or vessel called —, and they, or one of them, particularly the said W. W. or I. B. and T. G., of the city of —, insurance brokers and copartners, as agents for and in behalf of the owners or owner of the said ship, on or about —, caused a policy of insurance to be opened at the city of —, on the said ship — and her cargo, against the danger of the sea and capture of any foreign enemy, on a voyage to be performed by the said ship from the port of — to —, and which voyage, it was upon such occasion pretended, that the said ship was immediately to make, and such insurance was accordingly effected at the city of —, on or about, &c., and amongst other persons who underwrote or subscribed the said policy, plaintiffs respectively underwrote the same for the sum of \$— each at or after the premium of — per cent to return — per cent for having departed with the W. I. convoy if arrived, *i. e.*, plaintiff I. R. the sum of \$— upon the said ship, which was valued in the said policy at \$—, and the rest of plaintiffs the like sum of \$— each, upon the cargo on board the said ship; as in and by the, &c.

That notwithstanding the representations made to the plaintiffs at the time of making the aforesaid insurance, with regard to the port of the said ship's destination, the voyage really intended to be made by her was not from the port of —, as mentioned and expressed in the said policy, but from the port of — to — or some other port in —, or to some other different port or place than —. And

\* 2033 the \* plaintiffs having been deceived and imposed upon by such untrue representations of the said ship's intended voyage, the said insurance was fraudulent, and therefore the said insurance was null and void.

That the said ship afterwards sailed from the port of —, with some other ships which were to proceed under convoy for —; but the said ship — soon after quitted the said fleet and convoy, and deviated from her regular course or track of such a voyage, and proceeded to some other port or place not specified or mentioned in the said policy of insurance, particularly to the port of —, or some other port or place in —, where the said ship and her cargo were sold for a large sum of money in the whole, and which was afterwards received by the said W. W. and the other joint owners of the ship or some or one of them.



That the plaintiffs well hoped, under the circumstances aforesaid, they should not have been called upon for payment of any sums of money whatsoever on account of their having subscribed or underwrote the aforesaid policy of insurance.

But the defendants pretend that the insurance was not made fraudulently or unfairly, and that the plaintiffs were not in any manner imposed upon therein, and that the voyage actually intended to be made by the said ship — was the voyage particularly mentioned and specified in the said policy; viz., from the port of — to —, and that she never made any deviation therefrom. And they also sometimes pretend that the said ship was lost or foundered at sea in the regular course or track of the said voyage. And at other times they give out that the said ship was in the course of her voyage captured as lawful prize, and that for some or one of such reasons the plaintiffs and the several other underwriters on said policy became liable to pay the several sums insured or underwrote by them respectively on the aforesaid policy.

The plaintiffs charge the contrary, and that the plaintiffs were deceived and imposed upon in manner aforesaid respecting the port or place of the said ship's destination, for that the said ship was at the time, and upon the occasions aforesaid, destined or intended for a voyage to — or some other port in —, or some other port or place in —. And the plaintiffs charge that the said ship, in the course of the said pretended voyage, separated from the rest of the ships or fleet, and made a deviation and proceeded or sailed for the port of —, or some other port or place in —, or to some other port or place different from the port or destination mentioned in the said policy, where the captain or some other persons or person on board sold and disposed of the said ship and cargo as hereinbefore mentioned, and that divers remittances were afterwards made to —, on account of such sales or the produce thereof, to the said confederates the owners or some or one of them, such fraudulent \* insurance \* 2034 as aforesaid having been previously made thereon, pursuant to and in consequence of some plan or scheme concerted or contrived between the said confederates or some or one of them and the said —, the captain, or to which they, some or one of them, were or was privy, and that it was never meant, intended, or understood by and between the said confederates or any of them, that said ship should perform the voyage specified or mentioned in the aforesaid policy of insurance or proceed to —. And the plaintiffs moreover charge that the said ship was not lost, captured, or taken by the enemy, or however, not in the regular course or track of a voyage from — to —, as mentioned in the said policy of insurance. And as evidence thereof plaintiffs charge that the said captain or any other person never made any protest of the loss or capture of the said ship as is usual or customary in such cases, and which would have been made if the said ship had actually been lost or captured, nor was the said ship ever condemned, or any sentence of condemnation passed upon her as lawful prize. And as a further evidence of the aforesaid deception and im-

sition, plaintiffs charge that the aforesaid confederates [*the insurance brokers*], or some persons by their orders or directions, or with their privity or consent, some time in or about the month of —, wrote and sent a letter to their agent or correspondent at —, employed by them to effect the aforesaid insurance, directing him to apply to the plaintiffs or some other of the underwriters on the said policy, and to offer to cancel the said policy upon the repayment of the premiums; and such a proposition and offer was also made by the direction or with the knowledge of the said confederates [*the owners*], and in consequence of their knowledge, conviction, and belief, that the said insurance was fraudulently and unfairly made on the part of the said confederates [*the owners*], and that the underwriters on the said policy were deceived or imposed upon respecting the port of her destination, and that the said ship was not actually lost or captured, and that for such or some other reasons the said policy was null and void, and that the said confederates [*the owners*] have no just claim or demand upon the underwriters in respect of the sums insured or underwrote thereon. And plaintiffs also charge that divers letters or notes have been written by and sent to, or received by or passed between the said defendants or some or one of them, and their correspondents or agents at —, or the persons or person employed by them the said confederates, or some or one of them, in or about the making the aforesaid insurance, and the said —, the captain of the said ship, or some or one of them relating to or in some manner concerning the several matters and things hereinbefore mentioned and inquired after, particularly the making of the aforesaid insurance, and the fraud or deception practised or intended to be practised upon the plaintiffs and the underwriters of said policy, and

\* 2035 which said \* letters or notes, or some copies, abstracts, or extracts thereof, or of some or one of them, together with divers other papers, memorandums, or other writings relating to the matters aforesaid, are now, or lately were, in the custody, possession, or power of them, the said confederates, or some or one of them. And the plaintiffs also charge that the truth of the several matters and things hereinbefore charged and set forth, and particularly that the plaintiffs were deceived or imposed upon in the making of the aforesaid insurance, and that the said ship was not lost or captured, and that the said confederates [*the owners*] of the said ship have no just or fair demand upon the plaintiffs by virtue of, or under the aforesaid policy, would appear in and by the said letters and papers, in case the said confederates would produce the same, but which they refuse to do, although they have been frequently applied unto for that purpose; and under such or the like pretences as aforesaid, or some others equally unjust or unreasonable, the said confederates insist on the contrary, and the said confederate W. W. has also lately commenced separate actions at Law against the plaintiffs in — Court —, to recover the sums respectively underwrote by them on the said policy, and he threatens to proceed to judgment and execution thereon, well knowing that the plaintiffs are not able to make a good defence at Law in the said actions, without a full disclosure and discovery of the several matters

aforesaid, and without the benefit of the testimony of their witnesses who reside at — and — and other parts of —, and also in other parts and places abroad, and who could prove the truth of the several matters and things hereinbefore charged and inquired after. And the said confederates refuse to discover to the plaintiffs the names or places of abode of the other persons, whom they sometimes allege to be joint owners with them of the said ship. All which actings, &c. To THE END, therefore, &c.

And that the plaintiffs may have a full disclosure and discovery of the several matters and things aforesaid, and that the said defendant W. W. may be restrained, by the injunction of this honorable Court, from proceeding in the said actions already commenced by him, and that he and all the said other defendants may in like manner be restrained from commencing or prosecuting any other actions or action, or in any other manner proceeding at Law against the plaintiffs or any of them touching the several matters and things aforesaid; and that the plaintiffs may have one or more commission or commissions issuing out of and under the seal of this honorable Court, for the examination of their witnesses at — and —, and other parts of —, or any other parts or places abroad as there may be occasion. [*And for further relief.*] May it please, &c.

## \* SECTION XXV.

\* 2036

*To restrain Waste. -*76. *To restrain waste by persons having limited interests in property.*

The plaintiff A. B., of, &c. That the plaintiff before and at the time of making the indenture hereinafter mentioned was seised in his demesne as of fee, of and in certain tenements, with the appurtenances, situate at L., in the county of N., hereinafter particularly described; and being so seised, by a certain indenture, bearing date the — day of —, in the year —, and made between the plaintiff of the one part, and C. D., of, &c. (the defendant hereinafter named), of the other part, the plaintiff did demise, lease, set, and to farm let, unto the said C. D., his executors, administrators, and assigns, all, &c.

To hold the same, with the appurtenances, unto the said C. D., his executors, administrators, and assigns, from the — day of —, then last past, for the term of — years thence next ensuing, at the yearly rent of \$ —; and the said C. D. did thereby for himself, his executors, administrators, and assigns, covenant, promise, and agree with the plaintiff, his heirs and assigns, that he, the said C. D., his executors, administrators, or assigns, would during the said term keep the said premises in good repair, and manage and cultivate the said farm and lands in a proper, husband-like manner, according to the custom of the country as by the said indenture of lease, reference being thereunto had, will more fully appear. And the plaintiff further sheweth

unto your honors, that the said C. D., under and by virtue of the said indenture, entered upon the said demised premises, with the appurtenances, and became, and was possessed thereof for the said term, so to him granted thereof by the plaintiff as aforesaid. And the plaintiff further sheweth unto your honors, that at the time the said C. D. entered upon the said premises, the same were in good repair and condition, and the plaintiff hoped the said C. D. would so have kept the same, and have cultivated the said lands in a proper and husband-like manner, according to the custom of the country, and that such part of the said premises as consisted of ancient meadow or pasture ground would have remained so, and not have been ploughed up, and converted into tillage; and that no waste would have been committed on the said premises. But now so it is, may it please your honors, the said C. D., combining, &c., pretends, that the said premises now are in as good repair as when he entered in or to the same, and that he has cultivated the said farm and lands in a proper and husband-like manner, and that no waste has been committed by him thereon.

\* 2037 \* Whereas the plaintiff charges, that the said premises and the buildings, out-houses, gates, stiles, rails, and fences were in a good and perfect state and condition when the said C. D. entered upon the said premises, but now are very ruinous and bad, and the land very much deteriorated, from the wilful mismanagement and improper cultivation thereof by the said C. D., who has ploughed up certain fields called —, containing respectively — acres, and has otherwise committed great spoil, waste, and destruction in, upon, and about the said premises; and the plaintiff further charges, that the said C. D. ought to put the said premises into the same condition they were in when he entered thereon, and to make the plaintiff a reasonable compensation for the waste and damage done or occurred thereto; and that the said C. D. ought to be restrained, by the order and injunction of this honorable Court, from ploughing up the remaining pasture fields, part of the said demised premises, and particularly the fields called — and —, and containing respectively — acres, which he threatens to do, and also restrained from committing any further or other waste, spoil, or destruction, in and about or to the said estate and premises, or any part thereof. All which actings, &c.

And that the said C. D. may be compelled by the decree of this honorable Court to put the said premises into such repair and condition, in every respect, as far as circumstances will permit, as the same were in when he entered upon the same, under and by virtue of such demise as aforesaid; and may also be decreed to make a reasonable compensation to the plaintiff for all waste done, committed, or suffered by him on the said premises, and all damage occasioned thereto by his mismanagement or neglect (the plaintiff hereby waiving all pains and penalties incurred by the said C. D. on account of committing waste on the said premises), and that he may be decreed to keep the said premises in good and sufficient repair and condition, during the remainder of his interest therein, and to manage and cultivate the said farm and lands in a proper and husband-like manner, according to the

custom of the country, and that he may be likewise restrained, by the order and injunction of this honorable Court, from ploughing up the said remaining pasture fields, forming part of the said demised premises, and particularly the said fields called — and —, and from committing or permitting any further waste or spoil in, on, or to the said demised premises, or any part thereof. [*Aud for general relief.*] May it please, &c. [*End by praying an injunction in the terms of the prayer, and by praying process of a subpoena, as in forms Nos. 43, 55, ante, pp. 1887, 1888.*]

## \* SECTION XXVI.

\* 2038

*To prevent the Creation of a Nuisance where Irreparable Injury to an Individual would ensue.*

77. *Bill for an injunction to prevent the obstruction of ancient windows.*<sup>1</sup>

That the plaintiff A. B. now is, and for a considerable time past has been, possessed of a certain messuage or dwelling-house, with the appurtenances, situate at D., in the county of C., in which, for twenty years last past there has been, and still of right ought to be, two ancient windows to admit of light and air, for the convenient and wholesome use, occupation, and enjoyment of the said house. And the plaintiff further sheweth unto your honors, that G. H., of, &c. (the defendant hereinafter named), is possessed of a piece or parcel of land adjoining or contiguous to that part of the plaintiff's said house wherein are such windows as aforesaid; and the said G. H. has lately begun to dig the foundation for a certain wall or building in that part of the said piece of ground which is immediately opposite, and is within the space or distance of four feet only from such part of the plaintiff's said house as aforesaid; and the said G. H. has already erected, or caused to be erected, part of such intended wall or building of considerable height, and exceeding the height of twenty feet, which has greatly darkened the plaintiff's said dwelling-house and the appurtenances, and prevented the light and air entering the plaintiff's said house, through the said windows, and rendered the same close, uncomfortable, and unwholesome, and unfit for the habitation of the plaintiff. And the plaintiff further sheweth unto your honors, that, in consequence of such proceeding on the part of the said G. H. as aforesaid, the plain-

<sup>1</sup> In a case where the circumstances justified the Court in granting a mandatory injunction at the hearing, to compel the defendants to pull down newly erected buildings to the height of the former ones, on the ground of obstruction to the plaintiff's light and air; but where the plaintiff, having heard of the intended structure in April did not complain till the November following, during which time the

defendants had laid out large sums; and when the plaintiff had also, since bill filed, made an offer to take a money compensation for the injury to her rights, the Court, instead of an injunction, directed an inquiry as to the amount of damages sustained by the plaintiff. *Senior v. Pawson*, L. R. 3 Eq. 330. For form of decree in this case, p. 336.

tiff, in or as of last — term, brought an action on the case in, &c., which has since been tried, and a verdict obtained for the plaintiff, for the sum of \$ —, for the damages sustained by the plaintiff by the erection of such wall or building as aforesaid.

And the plaintiff further sheweth, that the plaintiff, both previously to, and since the determination of such action as aforesaid, frequently by himself and otherwise applied to the said G. H., and re-  
\* 2039 quested him \* not only to desist from continuing to erect, but also to take down and abate such wall or building, and nuisance, so as to prevent the plaintiff being so injured thereby as aforesaid, which the plaintiff hoped would have been done. But now so it is, may it please, &c., the said G. H., combining, &c., still proceeds in the erection of the said wall or building, and he pretends that, as an absolute owner of the said piece of ground, he has good right to erect the said wall or building on any part thereof, without any interruption or prevention by or on the part of the plaintiff; and he also pretends that the said wall or building is erected on an ancient foundation, and therefore, notwithstanding it may obstruct the plaintiff in the free enjoyment of the light and air, which was admitted through the plaintiff's said windows, that he is legally entitled so to do. Whereas the plaintiff charges the contrary thereof to be true, and that the said G. H. is only entitled to exercise such acts of ownership in and upon the said piece of ground as are legal and proper, and not to erect a wall or building so near to the plaintiff's messuage and dwelling-house as to obstruct his ancient windows, and become a nuisance to the plaintiff; and that even if the said wall or building be erected on an ancient foundation, but which the plaintiff nowise admits, yet the said premises being far distant from L., no right or privilege, to the injury or prejudice of the plaintiff, by reason thereof attaches to the said G. H., as such owner of the said piece of ground as aforesaid. And the plaintiff further charges, that from the slight and perishable materials of which the said wall or building is composed, the same is in great and constant danger of falling and doing considerable injury to the plaintiff, as the said G. H. well knows, but nevertheless he persists in his intention of continuing such erection, which will render the said wall or building much more injurious and dangerous to the plaintiff than the same now is, unless he shall be restrained therefrom by the order and injunction of this honorable Court. And that the said G. H. may make a full and true disclosure and discovery of and concerning the several matters aforesaid; and that the said G. H. may be restrained, by the order and injunction of this honorable Court, from proceeding in the erection of the said wall or building; and that he may be decreed to obviate and abate the said nuisance, so as to render the plaintiff's enjoyment of his said dwelling-house, with the appurtenances, as safe, wholesome, and fit for the plaintiff's habitation as the same was previously to the commencement of the erection of such wall or building as aforesaid. [*And for general relief.*] May it please, &c. [*End with praying an injunction in the terms of the prayer, and praying process, &c.*]

## \* SECTION XXVII.

\* 2040

*A Bill quia timet.*<sup>1</sup>

78. *Bill by a surety to compel the debtor on a bond in which he has joined to pay the debt incurred by breach of covenant.*

The plaintiff A. B., of, &c. That the plaintiff, at the special instance and request of C. D., of, &c. (one of the defendants hereinafter named), joined with the said C. D. in a certain bond or writing obligatory, bearing date the — day of —, whereby the plaintiff and the said C. D. respectively acknowledge themselves to be jointly and severally held and bound to E. F., of, &c. (the other defendant hereinafter named), in the penal sum of \$ —, subject to a condition thereunder written, that if the said C. D. should well and truly observe, perform, fulfil, and keep all and every the covenants whatsoever, which, on the part of the said C. D. ought to be observed, fulfilled, and performed, and which were contained in a certain indenture, bearing even date with the said writing obligatory, and made between the said C. D. of the one part, and the said E. F. of the other part, according to the true intent and meaning of the said indenture, then the said bond or obligation should be void. And the plaintiff further sheweth unto your honor, that the said indenture in the said writing obligatory mentioned, and which bore even date therewith, was made between the said E. F. of the one part, and the said C. D. of the other part; and the said E. F. did thereby demise, lease, set, and to farm let, unto the said C. D., his executors, administrators, and assigns, all that messuage, &c. [*Here state the subject of the demise.*] To hold the same, with the appurtenances, unto the said C. D., his executors, administrators, and assigns, from the — day of —, then last past, to the full end and term of — years thence next ensuing, and fully to be complete and ended; yielding and paying therefor, yearly, and every year, unto the said E. F., his heirs and assigns, the clear yearly rent or sum of \$ —, payable on the first day of January in each year. And the said C. D. did in and by the said indenture, for himself, his executors, administrators, and assigns, covenant, promise, and agree to and with the said E. F.,

<sup>1</sup> Eldridge v. Hill, 2 John. Ch. 281, states the rule for the allowance of such a bill.

For case of a bill in Equity to quiet title, see Clonston v. Shearer, 99 Mass. 209; Tucker v. Kenniston, 47 N. H. 270; *ante*, p. 1961, note. A bill for relief on the ground of danger of loss of a legacy for life, subject to a limitation over by way of remainder, is in the nature of a bill *quia timet*, and may be filed as well against the executor himself, where the fund is in his hand, as against the legatee for life, where the fund is in his hand. Rowe v. White, 16 N. J. Ch. 41.

A bill to remove a cloud upon title and to quiet the possession of real estate cannot be maintained by one out of possession. Frost v.

Spitley, 121 U. S. 552, 556; Northern Pacific R. Co. v. Amacker, 7 U. S. App. 33, 42. Equity may interfere to prevent a threatened cloud on title, as well as to remove an existing one: in such case there must appear to be a determination to create a cloud, and the danger must be more than merely speculative or potential. Finch J. in King v. Townshend, 141 N. Y. 358, 361, citing Sanders v. Yonkers, 63 N. Y. 492. A suit for an injunction against an apprehended injury to realty may be treated as a suit to quiet title, the averments being appropriate and sufficient, though there is no special prayer for such relief. Stockton v. Lockwood, 82 Ind. 158.

his heirs and assigns (amongst other things), in manner following; that \* is to say, that from and after the said messuage, &c., &c., should have been put in good and tenantable repair, by and at the expense of the said E. F., his heirs or assigns, he the said C. D., his executors, administrators, and assigns, should and would, during the said continuance of the said demise, at his and their own costs and charges, support, uphold, and keep the said messuage, &c., &c., in good and tenantable repair, order, and condition, and so leave the same at the expiration, or other sooner determination of the said term, as by the said indenture, reference being thereunto had, will appear. And the plaintiff further sheweth unto your honors, that the said C. D., under and by virtue of the said indenture, entered into and upon the said demised premises, and became and was possessed thereof for the term so granted to him as aforesaid, and the said E. F. put the said messuage, &c., &c., into good and tenantable repair at his own expense; and the plaintiff therefore hoped that the same would have been so kept by the said C. D. during the continuance of the said demise, and left by him at the expiration thereof; and that he would have performed all the other covenants in the said indenture contained, and by and on the lessee's part and behalf to be kept, done, and performed, and have freed and discharged the plaintiff from all liability in respect of the said bond. But now so it is, may it please your honors, the said C. D., acting in concert with the said E. F., and combining, &c., has not, as is alleged by the said E. F., kept and left the said messuage, &c., &c., in good and sufficient tenantable repair, according to his said covenant, and the said E. F. therefore threatens and intends to proceed against the plaintiff on the said bond for the amount of the damages which he alleges he has sustained by breach of such covenant by the said C. D., as aforesaid; and the said C. D., although often requested by the plaintiff so to do, refuses to protect and indemnify the plaintiff against any loss or liability which the plaintiff may sustain or be put unto by joining in such bond as aforesaid.

And that the said C. D. may be decreed by this honorable Court forthwith to pay and satisfy the said E. F. any demand which he may have against the plaintiff as co-obligor with the said C. D. in such bond as aforesaid, on account of the breach for non-performance of the said covenant, or of the several other covenants contained in the said indenture of demise, on the part and behalf of the lessee to be kept, done, and performed, or any of them, or otherwise howsoever, under and by virtue of the said bond; and that the plaintiff may be indemnified and discharged by the said C. D. from all loss and liability whatsoever in respect thereof. [*And for general relief.*] May it please your, &c. [*End by praying subpoena against the said C. D. and E. F.*]

79. *Where a Joint-Stock Banking Company are suing.*] In and previously to the year 1844, the London and Westminster Bank was, and  
2032



has since continued to be, and still is, a Joint-Stock Banking Company, composed of more than six persons, carrying on business at Lothbury, in the city of London, and at —, and other places, in the county of Middlesex, and the plaintiff is one of the members and a duly registered officer of the said Banking Company, and as such is able to sue and be sued under the provisions of the statute in that case made and provided.

80. *In a case of a Joint-Stock Banking Company, where their public officer is made a defendant.*] The London and County Bank is a Joint-Stock Banking Company duly registered, and the defendant is the public officer thereof, who is entitled to sue and be sued in respect of all transactions in which the said Banking Company is concerned.

81. *Where deeds not in plaintiff's possession.*] The plaintiff has not nor ever had in his possession or power the conveyances and other assurances by which, &c., but the same are now in the possession or power of A. S., or some other of the defendants hereto, and therefore the plaintiff cannot set forth the particulars of such conveyances and other assurances more perfectly than is hereinbefore mentioned, but he claims leave to refer thereto when the same shall be produced.

82. *Where defendant out of jurisdiction.*] The said — is now residing in parts beyond the seas, out of the jurisdiction of this honorable Court; that is to say, at —, in the Kingdom of —.<sup>1</sup>

83. *Accumulations of funds.*] And they the said defendants, — [*the executors*], from time to time laid out and invested such rents and profits in the purchase of government stocks, in their names, upon the trust and according to the directions of the said will, and they again laid out and invested the dividends and interest of such stock in the purchase of like stock in their names, by way of accumulation, in the manner directed by the said will.

84. *Allegation in bill by assignee of debt against debtor.*] The said indenture of assignment does not contain any power authorizing the plaintiff to use the name of the defendant in any action or proceedings \* at Law for the recovery of the said debt of £ —, so \* 2043 due and owing from the said —, and the defendant refuses to permit the plaintiff to use his name in the action against the said —, for the recovery of the said debt of £ —, and the defendant, acting in collusion with the said —, threatens and intends to receive the said debt from the said —, and to release him therefrom.<sup>1</sup>

85. *Prayer for transferring fund from the credit of one cause to that of another.*] That the Accountant-General of this honorable Court may

<sup>1</sup> If a defendant out of the jurisdiction is served with a bill, he must also be served with the subsequent proceedings, as if he were within the jurisdiction. *Lanham v. Pirie*, 2 Jur. N. S. 1201, 7. C. S.

<sup>1</sup> The assignee of a debt cannot, unless some impediment exists in the way of his recovering

his debt at Law by using the creditor's name, maintain a suit in Equity. *Hammond v. Messenger*, 9 Sim. 327; *Rose v. Clarke*, 1 Y. & C. C. 534; *Sewell v. Moxey*, 2 Sim. N. S. 189; *Clark v. Cort*, Cr. & Ph. 154; see *ante*, p. 197, notes.

be ordered to transfer the said £ — Bank £3 per cent annuities, and the said sum of £ — cash, now standing in his name in the books of the Governor and Company of the Bank of England, in trust in the said cause “S. v. B.,” and all dividends which may accrue thereon previously to such transfer, from the said cause of “S. v. B.” into this cause, and that the same may be duly administered in this cause, and be paid to or secured for the benefit of the parties entitled thereto.

86. *Prayer for the adoption of proceedings had in another suit.*] That in making the inquiries, and taking the accounts, required for the purpose of this suit, any of the proceedings had in the said suit of “A. v. B.,” which can properly or usefully be adopted, may be adopted accordingly; and that the costs of the said suit of “A. v. B.,” remaining unpaid (if any) may be prosecuted for in this suit.

87. *Prayer that boundaries may be ascertained.*] That the boundaries of the said real estate of the said J. T. may be defined and set out, under the decree of this honorable Court; and that all necessary directions may be given for that purpose.

88. *For declaration of rights.*] That the rights and interests of all parties in the said real and personal estate may be ascertained and declared.

89. *Respecting formal party.*] That the defendant A. B., upon being served with a copy of the bill, may be bound by all the proceedings in the cause.

## ORIGINAL BILLS NOT PRAYING RELIEF.

## SECTION XXVIII.

*Bill to perpetuate Testimony.*90. *Bill to perpetuate the testimony of witnesses to a will.*

Humbly complaining, sheweth unto your honors the plaintiff A. B., of, &c., that C. D., late of, &c., deceased, before and at the time of making his will hereinafter mentioned, was seised in fee of and in divers freehold estates, which are hereinafter more fully mentioned and described; and the said C. D. being so seised as aforesaid, and being of sound and disposing mind, memory, and understanding, duly made and published his last will and testament in writing, bearing date the — day of —, signed by him, the said C. D., and subscribed and attested according to law; and which said will, with the attestation thereof, is in the words and figures following; that is to say: [*set out the will and the attestation verbatim*], as by the said will and the attestation clause thereof, reference being thereto had, will appear.

And the plaintiff further sheweth unto your honors, that the said C. D. departed this life on or about the — day of —, without having revoked or altered his said will, leaving his brother E. D., of, &c., the defendant hereinafter named, his heir-at-law; and upon the death of the said testator, the plaintiff, under and by virtue of the said will, entered upon and took possession of all the said freehold estates thereby devised to the plaintiff for life, and the plaintiff is now in possession thereof. And the plaintiff hoped that no disputes would have arisen respecting the devises contained in the said will, or the validity thereof. BUT NOW SO IT IS, &c., the said E. D. pretends that the said will is void and ineffectual; and although he will not dispute the validity thereof during the lives of the subscribing witnesses thereto, yet he threatens and intends to do so when they are dead, so that the plaintiff may be deprived of their testimony.

And the plaintiff further sheweth, that all of the said subscribing witnesses are upwards of seventy years of age and in feeble health [*or are about to depart from the Commonwealth or State*], and that the \*plaintiff fears the testimony of the said witnesses may \*2045 be lost by their death [*or departure from the Commonwealth or State*] before the cause can be investigated in a Court of Law.

In consideration whereof, &c.; and that the plaintiff may be at liberty to have the several subscribing witnesses to said will examined,

and that the plaintiff, if necessary, may have a commission or commissions for the examination of the said subscribing witnesses to the said will, to the end that their testimony may be preserved and perpetuated; and that the plaintiff may be at liberty to read and make use of the same on all future occasions, as he shall be advised. May it please your honors, &c.

## SECTION XXIX.

*Bill for Discovery.*

91. *Bill for discovery in aid of an action at Law; the defendant having pleaded a set-off, and inserted items in the particular of such set-off which ought not to have been charged against the plaintiffs, being trustees under the deed of trust executed by two partners in trade for the benefit of their creditors.*

Humbly complaining, show unto your honors the plaintiffs P. M., of, &c., J. A., of, &c., and J. R., of, &c., that by an indenture of assignment bearing date —, and made between J. G. and J. W., therein described, of, &c., of the first part, the several persons who had thereunto set their hands and affixed their seals, creditors of the said J. G. and J. W., as copartners as aforesaid, or of the said J. G., on his own separate account, of the second part, and the plaintiffs of the third part, they the said J. G. and J. W. (amongst other things), bargained, &c. [*setting out that part showing the assignment to the plaintiffs, and particularly the clause which gives them power to sue*], as in and by, &c. And the plaintiffs further show unto your honors, that at the time of the execution of the said indenture there was justly due and owing to the said J. G. and J. W., on their partnership account, from R. K., of, &c. (the defendant hereinafter named), the sum of \$ —, being the balance of an account between the said J. G. and J. W., the particulars whereof are set forth in the schedule hereto. And the plaintiffs further show that they have repeatedly applied to the said R. K., to pay to them as such trustees as aforesaid the said sum of \$ —, with which just and reasonable requests the plaintiffs well hoped the said defendant would have complied, as in justice and equity he ought to have done.

\* 2046 \* BUT NOW SO IT IS, &c., he has absolutely refused so to do; and the plaintiffs have therefore been compelled to commence an action in the names of the said J. G. and J. W., against the said defendant to compel the payment of the said balance; and the plaintiffs charge that the said defendant has pleaded a set-off in the said action, and has delivered a particular of such set-off, which as far as it extends, to the date of the said assignment to the plaintiffs, corresponds in substance with the creditor side of the account set forth in the schedule hereto; but the said defendant has added thereto three articles for copper delivered in the year —, for which he claims credit in the said action. Whereas the plaintiffs charge that the said defendant at or

about the time of the execution of the said assignment to the plaintiffs was apprised thereof, or had some reason to know, believe, or suspect, and did know, believe, or suspect, that the said J. G. and J. W. had made such assignment, or some assignment of their copartnership property to the plaintiffs or to some trustees for the benefit of their creditors. And the plaintiffs further charge that the said copper was delivered at —, which had belonged to the said J. G. and J. W., and had been comprised in the said assignment to the plaintiffs, and had been afterwards sold by the plaintiffs to the said J. G.; and the said J. G. applied to the said defendant to purchase the said copper on his the said defendant's credit, or to guarantee the payment for the said copper to the person from whom it was bought, by reason that the circumstances of the assignment to the plaintiffs being known, the said J. G. could not obtain credit for the said copper in his own name alone; and the said defendant for that reason lent his credit to the said J. G. for the purchase of the said copper, or guaranteed the payment thereof, trusting to the personal responsibility of the said J. G. And the plaintiffs further charge that the said defendant has also added to his said particular of set-off a sum of \$ —, for a year and a half's wages for one J. B. C. Whereas the plaintiffs charge that the said defendant has no just right to any such demand against the plaintiffs as trustees under said assignment; and the said defendant refuses to set forth how he makes out such his claim, and when and up to what time he computes the said wages. And the plaintiffs charge that they are advised that they cannot safely proceed in the said action so commenced by them as aforesaid in the names of the said J. G. and J. W., without a discovery of the circumstances hereinbefore stated from the said defendant. To THE END, therefore, &c.

And that the said defendant may set forth how he makes out such his said claim, and when and up to what time he computes the said wages, and whether the plaintiffs can safely proceed in the said action so commenced by them as aforesaid, in the names of the said J. G. and J. W., without a discovery of the circumstances hereinbefore stated from the said defendant. And that the said defendant may make a \*full and true discovery of all and every the matters \* 2047 aforesaid. May it please, &c.

[*Pray subpoena against R. K.*]

## 92. *Bill of discovery and prayer.* [*Modern English Form.*]

*Allegation or charge.*] That the plaintiff is unable safely to defend the action [*or suit*] which has been so commenced [*or instituted*] and is now pending in the said Court of — [*or in this honorable Court*], without a full discovery from the said defendant of all and singular the matters and things hereinbefore stated.<sup>1</sup>

<sup>1</sup> A person filing a bill of discovery is discovery. *Heming v. Dingwall*, 2 Ph. 212, bound to state the purpose for which he wants 214.

*Prayer.*

That the defendant may make a full and true discovery and disclosure of and concerning the matters hereinbefore stated.<sup>2</sup>

<sup>2</sup> This is the prayer, where no relief is sought, but merely a discovery from the defendant.

The powers which Courts of Law, as well as Equity, now generally possess, under recent statutes, of obtaining discovery from parties to actions and suits, have rendered bills of discovery of rare occurrence; but there may be occasions in which it would be expedient to file such a bill. *Lovell v. Galloway*, 19 Beav. 1.

The jurisdiction of Courts of Law, to obtain discovery under late English statutes, is not limited to matters respecting which a discovery can be obtained in a Court of Equity. *Osborn*

*v. London Dock Co.* 1 Jur. N. S. 93; *Martin v. Heming*, 10 Exch. 478.

The words, "*that such other order may be made upon the defendants as the nature of the case may require*," do not convert a bill of discovery into a bill for relief. *Southeastern Ry. Co. v. Submarine Telegraph Co.* 18 Beav. 427; 17 Jur. 1044.

The prayer for discovery in a bill for relief does not give Equity jurisdiction unless inability to establish the facts at Law is alleged. *Cecil National Bank v. Thurber*, 59 Fed. Rep. 913.

## BILLS NOT ORIGINAL.

## SECTION XXX.

1. *Supplemental Bills.*<sup>1</sup>93. *Supplemental bill against the assignee of a bankrupt defendant.*

Humbly complaining, show unto your honors the plaintiffs A. B. and C. D., of —, that the plaintiffs did, in or as of — term — exhibit their original bill of complaint in this honorable Court against B. L., of, &c., praying that an account might be taken of the personal estate, effects, &c. And the plaintiffs further show that the said defendant, having been served with process to appear, appeared accordingly and put in his answer to the said bill, and the plaintiffs replied to the said answer, but before any further proceedings were had in the said cause, and on or about the — day of — a commission of bankruptcy — was awarded and issued against the said B. L., who has been thereupon duly found and declared bankrupt; and E. D., of —, the defendant hereinafter named, having been since duly chosen assignee of the estate and effects of the said bankrupt, all the estate and effects late of the said bankrupt have been duly conveyed and assigned to the said E. D. And therefore the plaintiffs are advised that they are entitled to the same relief against the said E. D., as they would have been entitled to against the said B. L., if he had not become bankrupt. To THE END, therefore, &c.

And that the plaintiffs may have the full benefit of the said suit and proceedings therein against the said E. D., and may have the same relief against him as the plaintiffs might or could have had against the said B. L., in case he had not become bankrupt; or that the plaintiffs may have such further or other relief in the premises as to your honors shall seem meet. May it please, &c.

<sup>1</sup> The occasions for the use of supplemental bills are very much limited in England by late acts of Parliament and rules of Court. See *ante*, Vol. II. p. 1589, *et seq.*

In Rhode Island, supplemental bills, bills of revivor, and cross-bills are made unnecessary by statute. Pub. Stats. c. 192, §§ 14, 16. As to adding new parties by supplemental bill, see

*Tubman v. Wason Manuf. Co.* 44 Fed. Rep. 429; *Hospes v. Northwestern Manuf. Co.* 22 id. 565. New matters arising after the suit was instituted, if introduced by a supplemental bill, will not be permitted to change the rights of the parties before the Court. *Ledwith v. Jacksonville*, 32 Fla. 1.

\* 2049 \* 94. *Supplemental bill in a patent cause, stating the fact of an extension since the filing of the original bill.*

To the Judges of the Circuit Court of the United States, for the District of Massachusetts.

*In Equity.*

E. H., Jr., of B., in the State of N. Y., and a citizen of the State of N. Y., brings his supplemental bill against C. W. W., of said Massachusetts.

And thereupon your orator complains and says, that he filed his original bill against the defendants in this Court, August 9, 1859, wherein he prayed for a discovery, account, payment of profits, and an injunction to restrain the said defendants from infringing on your orator's patent, granted to him by the United States of America, for improvement in sewing machines, dated September 10, 1846; and for other relief, as stated in his said original bill.

And your orator further shows, that since the filing of his said original bill, namely, on the eighth day of September, in the year eighteen hundred and sixty, upon the application of your orator, and after due proceedings had in all respects as required by law, the Commissioner of Patents granted the extension of said patent for the term of seven years from and after the expiration of the first term thereof, viz., the tenth day of September, 1860, and made a certificate of such extension thereon, and entered the same on record in the Patent Office in due form of law; and thereupon the said patent was renewed and extended, and now has the same effect in Law as though it had been originally granted for the term of twenty-one years, as in and by said certificate or a certified copy thereof here in Court to be produced, will more fully appear. Yet the said defendant, well knowing the premises, but contriving how to injure your orator, and without his consent or allowance, and without right and in violation of said letters patent and your orator's exclusive rights, secured to him as aforesaid, from September 1, 1857, has made, used, or vended, and still does make, use, or vend to others to be used in said district and in other parts of the United States, a large number of sewing machines, but how many your orator cannot state, but prays that the defendant may discover and set forth, each embracing substantially the improvement in sewing machines, or a material part thereof, patented by your orator as aforesaid, and thereby the said defendant has infringed, and still does infringe, and cause your orator to fear that in future he will infringe upon the exclusive rights and privileges intended to be secured to your orator in and by his said letters patent.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief herein and in his said  
\* 2050 original \* bill prayed; and may, under oath and according to his best and utmost knowledge, remembrance, information, or belief, full, true, direct, and perfect answer make to all and singular the premises, and more especially may answer, discover, and set forth, whether



during any and what period of time since September 1, 1857, and where he has made, used, or vended to others to be used; for any and what consideration, any, and how many sewing machines; and whether or not the same embraced the said improvement in sewing machines, or any substantial part thereof, patented to your orator as aforesaid, or how the same differed from your orator's said patent, if at all.

And that the said defendant may answer the premises, and may be decreed to account for and pay over to your orator all gains and profits realized from his unlawful making, using, or vending of sewing machines, embracing said improvement patented to and vested in your orator as aforesaid; and may be restrained, by an injunction to be issued out of this honorable Court, or by one of your honors, according to law in such case provided, from making, using, or vending any sewing machines embracing said improvement, or any substantial part thereof, patented to your orator as aforesaid, and that the infringing machines now in possession or under the control of the defendant, may be delivered up to your orator or be destroyed; and for such further and other relief in the premises as the nature of the case may require, and to your honors may seem meet.

May it please your honors, &c.

E. H., JR.

J. G., for Plaintiff.

95. *Second supplemental bill in a patent cause, stating that since the filing the first supplemental bill, the patent had been surrendered, &c., and a new patent issued.*

To the Judges of the Circuit Court of the United States, for the District of Massachusetts.

*In Equity.*

E. H., Jr., of B., in the State of N. Y., and a citizen of the State of N. Y., brings this his second supplemental bill against C. W. W., of B., in the district of Massachusetts, sewing machine maker, and a citizen of the State of Massachusetts.

And thereupon your orator complains and says, that he filed his original bill against the said defendant, in this Court, August 9, 1859, and his first supplemental bill, November 5, 1860; wherein he prayed for a discovery, account, payment of profits, and an injunction to restrain the said defendant from infringing your orator's patent, granted to him by the United States of America, for improvement \* in \* 2051 sewing machines, dated September 10, 1846; and for other relief, as stated in his original and supplemental bill.

And your orator further shows, that since the filing of his said original bill, namely, on the eighth day of September, in the year eighteen hundred and sixty, upon the application of your orator, and after due proceedings had in all respects as required by law, the Commissioner of Patents granted the extension of said patent for the term of seven years from and after the expiration of the first term, viz., the

tenth day of September, 1860, and made a certificate of such extension thereon, and entered the same on record in the Patent Office in due form of law, and thereupon the said patent was renewed and extended, and now has the same effect in law as though it had been originally granted for the term of twenty-one years, as in and by said certificate, or certified copy thereof, here in Court to be produced, will more fully appear, and thereupon his first supplemental bill was filed as aforesaid.

And your orator further shows, that since the filing of his said first supplemental bill, namely, on the nineteenth day of March, in the year eighteen hundred and sixty-one, his aforesaid patent having been surrendered and cancelled on account of a defective specification, a new patent was duly issued to him for the same invention, in accordance with his corrected description and specification, whereby was granted and secured to your orator, his heirs, administrators, or assigns, for said term of twenty-one years from September 10, 1846, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement in sewing machines therein specified and claimed, as in and by said reissued letters patent, or a certified copy thereof, here in Court to be produced, will more fully appear.

And your orator further shows, that since the extension of his said patent, he has himself become a manufacturer of sewing machines, and has licensed many other parties to manufacture and sell sewing machines, embracing his said patented invention; and that your orator and his licensees have made very large investments for the purpose of fully supplying the market with the best sewing machines, and that the continued infringement of your orator's said patent, committed by the defendant, has caused and is still causing irreparable injury to your orator's said rights and business, and to the investments and business of your orator's licensees under his said patent; yet the said defendant, well knowing the premises, but contriving how to injure your orator and without his consent or allowance, and without right, and in violation of said letters patent, and your orator's exclusive rights, secured to him as aforesaid, has continued since the reissue aforesaid, as well

as up to that time, to make and vend, and still does make and  
 \* 2052 vend to others to be used in said district and in other parts \* of the United States, a large number of sewing machines, but how many your orator cannot state, but prays that the defendant may discover and set forth each, embracing substantially the improvement in sewing machines, or a material part thereof, patented to your orator as aforesaid, and thereby the said defendant has infringed, and still does infringe, and cause your orator to fear that in future he will infringe upon the exclusive rights and privileges intended to be secured to your orator in and by his said letters patent.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief herein and in his said original bill prayed, and may, under oath, and according to his best and utmost knowledge, remembrance, information, or belief, full, true, direct, and perfect answer make to all and singular the premises, and

more especially may answer, discover, and set forth, whether during any and what period of time, since September 1, 1857, and where, he has made, used, or vended to others to be used, for any and what consideration, any, and how many, sewing machines, and whether or not the same embraced the said improvement in sewing machines or any substantial part thereof, patented to your orator as aforesaid, or how the same differed from your orator's said patent, if at all.

And that the said defendant may answer the premises, and may be decreed to account for and pay over to your orator all gains and profits realized from his unlawful making, using, or vending of sewing machines embracing said improvement patented to and vested in your orator as aforesaid; and may be restrained, by an injunction to be issued out of this honorable Court, or by one of your honors, according to law in such case provided, from making, using, or vending any sewing machines embracing said improvement, or any substantial part thereof, patented to your orator as aforesaid, and that the infringing machines, now in the possession or under the control of the defendant, may be delivered up to your orator or be destroyed; and for such further and other relief in the premises as the nature of the case may require, and to your honors may seem meet.

May it please your honor, &c.

E. H., JR.

B. R. C., of Counsel with Plaintiff.

96. *Supplemental bill after a hearing before a single justice, and reservation for the full Court, to bring forward the fact of the termination of the partnership concerning which the original bill was brought.*

To the Honorable the Justices of the Supreme Judicial Court.

Humbly complaining, sheweth unto your honors the plaintiff A. M. K., of N., in the county of M., widow of D. M. K., late of said N., merchant; that the plaintiff did, on or about the twenty-first day of \* May, A. D. 1861, exhibit her original bill of complaint \* 2053 against W. B., of B., in the county of S., Esquire, G. G., of said N., Esquire, A. Monerief K. and D. Malcolm K., also of said N., and minor children of the plaintiff and the said D. M. K., wherein the plaintiff prayed that the said defendants W. B. and G. G., and said minor children A. Monerief K. and D. Malcolm K., by a guardian for this suit, which the plaintiff prayed the honorable Court to appoint, might, upon their several and respective corporal oaths, full, true, direct, and perfect answer make to all and singular the premises, as fully in every respect as if the same were there repeated, and they thereunto particularly interrogated, according to the best of their respective knowledge, information, and belief; and that it might be determined by the judgment of this honorable Court whether, under the will of the said D. M. K., the share of the net profits of the business of the firm of H., B., & T. belonging to the estate of the said D. M. K. was, and was to be taken, as part of the income, or as part of the prin-

cipal fund of the residue of the estate of said D. M. K.; and that if it should appear that such share of the net profits of said partnership business constituted and formed a part of the income of said residue, the aforesaid defendants W. B. and G. G., executors and trustees under said will, and their successors in said trust, might be ordered and decreed to account with the plaintiff for the profits of said partnership business, and to pay over to the plaintiff such a proportion thereof as she was entitled to, under the provisions of the will of said D. M. K.; and that the plaintiff might have such other and further relief as the nature of her case might require: and that a writ of *subpœna* might be directed to the said defendants, commanding them, and every of them, to appear before your honors in this honorable Court, then and there to answer to all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors should seem meet.

And the plaintiff further sheweth, that, in accordance with the prayer of her bill, a guardian was duly appointed for the said minor children A. Moncrief K. and D. Malcolm K., to wit, H. D., Esquire, counsellor-at-law, and that said defendants having been served with process to appear, appeared accordingly, and put in their answers to the said bill of complaint, and thereupon the whole cause was set down for hearing upon the bill and answers; and thereafter, to wit, upon the third day of December, A. D. 1861, the same was heard before one of the Justices of this Court, the Honorable E. R. H., and was by said Justice reserved for the whole [full] Court; all of which, the foregoing, by the said bill and answers, and orders and decrees now remaining as of record in this honorable Court, fully appears.

And the plaintiff further sheweth, by way of supplement, that since the filing of the said original bill, and since the putting in of the answers, and the making of the several orders and decrees afore-  
 \* 2054 mentioned, \* to wit, on the fourth day of September now current, the aforesaid limited partnership theretofore existing, under the name and firm of H., B., & T., has been dissolved and terminated, in accordance with the provisions of the written contract of partnership between the said H., B., & T. of the first part, and the said D. M. K. of the second part, bearing date of the fourth day of September, A. D. 1858, as by reference to a copy of said contract hereto annexed, and made a part hereof, more fully appears. And the plaintiff avers, that the said executors and trustees have received from said partnership business, as the share of the net profits thereof, belonging to the estate of the said D. M. K., a very large sum of money, to wit, eighty thousand dollars or thereabouts.

To the end, therefore, that the said defendants, W. B., G. G., and the said minor children, A. Moncrief K. and D. Malcolm K., by their said guardian H. D., may, upon their several and respective corporal oaths, full, true, direct, and perfect answer make to all and singular the premises, as fully, in every respect, as if the same were here repeated, and they thereunto particularly interrogated, according to the best of their respective knowledge, information, and belief; and that the plaintiff may have

the full benefit of her said suit and proceedings therein, against the above-named defendants, and may have the same relief against said defendants as the plaintiff might or could have had in case her original bill of complaint had been filed after the termination and dissolution of the limited partnership of H., B., & T., and after the receipt, by said trustees, of said sum of eighty thousand dollars; and that the plaintiff may have such other and further relief in the premises as to your honors shall seem meet. May it please your honors to grant unto the plaintiff a writ of *subpoena*, to be directed to the said W. B., G. G., and H. D., thereby commanding them, and every of them, at a certain day, and under a certain penalty therein to be specified, personally to appear before your honors in this honorable Court, and then and there to answer all and singular the premises, and to stand to, perform, and abide by such order and decree therein, as to your honors shall seem meet; and the plaintiff will ever pray.

A. M. K.

97. *Supplemental bill to an original and amended bill filed by a lessee for the specific performance of an agreement to grant a further lease stating that the defendant has brought an ejectment against the plaintiff, and praying an injunction to restrain his proceeding at Law.*<sup>1</sup>

Humbly complaining, sheweth unto your honors the plaintiff J. K., of, &c., that in or as of — term —, the plaintiff exhibited his \* original bill of complaint in this honorable Court against \* 2055 H. B. S., and which said bill has been amended by order of this honorable Court, thereby praying that the said defendant might be decreed specifically to perform his agreement with the plaintiff, touching the lease of the farm and premises in the said bill mentioned, and to grant the plaintiff a lease thereof for — years, commencing from the expiration of his former lease, at the yearly rent of \$ —, the plaintiff being ready and willing to do and perform everything on his part required to be done and performed in pursuance of the said agreement. And the plaintiff further sheweth, that the said defendant appeared and put in his answer to the said original bill; as by the said bill and answer now remaining as of record in this honorable Court, reference being thereto had, will appear. And the plaintiff further sheweth, by way of supplement, that since the filing of the said original bill the said defendant has caused an action of ejectment to be commenced in the — Court —, for the purpose of turning the plaintiff out of possession of the said farm and premises, and the said action is still depending in the said Court. And the plaintiff being advised that the said defendant cannot support such action, and that the plaintiff is entitled to a specific performance of the said agreement as prayed by his said amended bill, he has by himself and his agents several times applied to and requested the said defendant to desist from proceeding in the said action, and he was in hopes that he would have complied with such fair and reasonable requests, as in justice and equity he

<sup>1</sup> See *ante*, Vol. II. p. 1589, *et seq.*

ought to have done. But now so it is, &c., the said H. B. S. refuses, &c., and insists upon proceeding in said action, and to turn the plaintiff out of possession of the said farm and lands, to the manifest wrong and injury of the plaintiff in the premises. To THE END, therefore, &c.

And that the said defendant may be restrained by the injunction of this honorable Court from proceeding in the said action, and from commencing any other action or proceeding at Law for the purpose of turning the plaintiff out of possession of the said farm and lands. May it please, &c.

[*Pray subpœna and injunction against H. B. S.*]

A. C.

*Bills of Revivor.*<sup>1</sup>

98. *Bill of revivor (before decree) by the administrator of the plaintiff in the original suit, the executors in his will having renounced probate.*

Humbly complaining, sheweth unto your honors, the plaintiff C. D., of, &c., that J. A., late of, &c., but now deceased, on or about—, exhibited his original bill of complaint in this honorable Court against G. T. W., of, &c., as the defendant thereto, thereby stating, &c., praying, &c. [*here state the prayer*]. And the plaintiff further sheweth unto your honors, that the said defendant, having been duly served with process for that purpose, appeared and put in his answer to said bill, as in and by the said original bill, &c. And the plaintiff further sheweth, that some proceedings have been had before—, one of the masters of this Court, to whom this cause stands referred, but no general report has yet been made in the said cause; and that the said J. A. lately and on or about the— day of—, departed this life, having first made and published his last will and testament in writing, bearing date the— day of—, and a codicil thereto bearing date the— day of—, and thereby appointed M. C. and W. W. executors thereof. And the plaintiff further sheweth, that the said M. C. and W. W. have renounced probate of the said will and codicil of the said J. A., deceased, and decline to act in the trusts thereof, and that the plaintiff has obtained letters of administration with the will annexed of the goods, chattels, rights and credits of the said J. A., deceased, to be granted to him by and out of the proper Court, and has thereby become and now is his legal personal representative. And the plaintiff further sheweth, that the said suit and proceedings have become abated

<sup>1</sup> The necessity for bills of revivor is obviated to a considerable extent in England by the late acts of Parliament and orders in Chancery, providing a simpler mode of bringing cases abated again before the Court. See *ante*, Vol. II. p. 1506, *et seq.* Other modes of revivor are provided in Massachusetts, 25th Rule of Chancery; in Maine, 21st Rule of Chancery;

in New Hampshire, 28th Rule of Chancery. A petition by a defendant, containing sufficient averments for a bill of revivor, and praying that the cause be revived in the names of proper representatives of the deceased plaintiff, was treated as a bill of revivor, in *Reid v. Stuart*, 20 W. Va. 382.

by the death of the said J. A., and the plaintiff is, as he is advised, entitled to have the said suit and proceedings revived against the said defendant G. T. W., and the said accounts by the aforesaid order of reference directed, prosecuted, and carried on, and to have the said cause put in the same plight and condition as the same was in previously to the abatement thereof by the death of said J. A.

To the end, therefore, that the said defendant may answer the premises; and that the said suit and proceedings which so became abated \* as aforesaid may stand revived, and be in the same \* 2057 state and condition as the same were in at the time of the death of the said J. A., or that the defendant may show good cause to the contrary; May it please your honors to grant unto the plaintiff a writ of *subpoena* to revive [and answer], issuing out of and under the seal of this honorable Court, to be directed to the said G. T. W., thereby commanding him at a certain day and under a certain penalty, to be therein limited, personally to be and appear before your honors, in this honorable Court, then and there [to answer the premises and] to show cause, if he can, why the said suit, and the proceedings therein had, should not stand and be revived against him, and be in the same plight and condition as the same were in at the time of the abatement thereof: and further to stand to, and to abide, such order and decree in the premises as to your honors shall seem meet. And the plaintiff shall ever pray, &c. [*Where it is only necessary to pray a subpoena to revive, the words within brackets should be omitted.*]

99. *Bill of revivor on the marriage of a female plaintiff.*

Humbly complaining, show unto your honors, the plaintiffs, A. B., of, &c., and E. B. his wife, that on or about —, the said E. B., by her then name of E. M., exhibited her original bill of complaint in this honorable Court against — and W. M., as defendants thereto, thereby stating, &c., and praying, &c. [*state the prayer of the bill*]. And the plaintiffs further show, that the said several defendants being duly served with process, severally appeared and put in their answers to the said original bill; as in and by, &c. And the plaintiffs further show, that the said E. B. took several exceptions to the answer put in by the said defendant W. M. to the said original bill, and which said exceptions were, upon argument, allowed by the Master, to whom the same were referred. And the plaintiffs further show, that said E. B. afterwards obtained an order of this honorable Court to amend her said original bill, and that the said defendant W. M. might answer the said amendments at the same time that he answered the said exceptions. And the plaintiffs further show, that before the said W. M. had put in his answer to the said exceptions, or any further proceedings were had in the said suit, and on or about the — day of —, the said E. B. intermarried with said A. B., whereby the said suit and proceedings became abated. And the plaintiffs are advised that they are entitled to have the same revived, and to be put in the same plight and condition as the same were in at the time of the abatement thereof. To the end,

therefore, that the said suit and proceedings, which so became abated as aforesaid, may stand revived, and be in the same plight and condition as the same were in at the time of such abatement, or that  
 \* 2058 \* the said defendants may show good cause to the contrary; May it please your honors to grant unto the plaintiffs a writ of *sub-pœna* to revive, issuing out of, and under the seal of this honorable Court, to be directed to the said W. M., thereby commanding him, at a certain day, and under a certain penalty to be therein inserted, personally to be and appear before your honors in this honorable Court, then and there to answer and show cause, if he can, why the said suit, and the proceedings therein had, should not stand and be revived against him, and be in the same plight and condition as the same were in at the time of the abatement thereof and further to stand to and abide such order and decree in the premises, as to your honors shall seem meet.

And the plaintiffs will ever pray, &c.

100. *Bill of revivor and supplement, in a case which was considered as not fulling within either of sections 52 and 53 of 15 and 16 Vic. c. 86. [Modern English Form.]*

M. S., H. S., and E. S., infants, by A. B.,	} Plaintiffs,
their next friend . . . . .	
and	
S. D. and F. D., his wife, R. B. and E. B.,	} Defendants.
his wife, R. J. B., J. S., J. B., A. S.,	
and L. A. . . . .	

*Bill of Revivor and Supplement.*

To, &c.

Humbly complaining, &c.

1. [*Original bill filed by two defendants, the femes covert, then both unmarried and infants, and the plaintiffs in the supplemental suit against the defendants J. S., A. S., and L. A., stating will of C. D., devising real estates to L. A. and other trustees (deceased), under which the children of the testator's son, the plaintiffs in the original cause, and the defendant J. S., and also the defendant A. S., took beneficial interests, and praying the execution of the trusts of the will.*]

2. [*Appearance of the defendants to original bill.*]

3. Divers proceedings and orders have since been taken and made respectively in said original suit.

4. The above-named defendant F. D., then F. S., attained the age of twenty-one years on the, &c., and on the, &c., she intermarried with and became the wife of the defendant S. D., and the said suit thereby became abated.

And by way of supplement the above-named plaintiffs show as follows:—

\* 2059 \* 5. No settlement affecting the share or interest of the above-named defendant F. D. in the said real estates has ever been made.



6. By an order made by his honor, &c., on, &c., it was ordered that upon producing to the registrar an office copy of an affidavit, proving the due execution by all parties of a deed in exact conformity with the draft articles for a settlement in the order mentioned, the defendant E. B., then E. S., and the defendant R. B. should be at liberty to intermarry.

7. [*Articles for settlement accordingly, of which J. S. and J. B. are trustees, and by which defendant R. B. covenanted to settle his intended wife's share in the estates, upon trust for her separate use for life, with remainder for the benefit of their children. The trusts are shortly stated.*]

8. The marriage between the defendants R. B. and E. B. his wife, was duly solemnized, and the said A. B. has since attained the age of twenty-one years.

9. There has been issue of the last-mentioned marriage, one child only; viz., the above-named defendant R. J. B.

10. Under the circumstances aforesaid, the said original suit and proceedings have become defective as well as abated, and the above-named plaintiffs are desirous that the same should be revived, and should be carried on and prosecuted between the parties to this suit, in manner hereinafter prayed.

### *Prayer.*

The plaintiffs pray as follows:—

1. That the said suit, orders, and proceedings may stand revived, and be in the same plight and condition that the same would have been in if the same had not become abated, and that this suit, so far as may be necessary or proper, may be deemed and taken to be supplemental to the said original suit as revived; and that the order and proceedings in said last-mentioned suit may be carried on and prosecuted between the parties to this suit, in the like manner as between the parties to said original suit as revived.<sup>1</sup>

2. [*General relief.*]

Names of defendants.

The defendants, &c.

<sup>1</sup> In the case in the text it was considered that a supplemental bill was necessary, and that it did not fall under §§ 52, 53, of the 15 & 16 Vic. c. 86, or either of them. The cases, however, upon the subject are not satisfactory. In the following cases where there was a *transmission* of interest, the fifty-second section has been held to apply. *Atkinson v. Parker*, 2 De G. M. & G. 221; *Fullerton v. Martin*, 1 Drew. 238; *Lash v. Miller*, 4 De G. M. & G. 841;

*Pickford v. Brown*, 1 Kay & J. 643; *Hall v. Clive*, 20 Beav. 575; *Notley v. Palmer*, 1 Jur. N. S. 221, V. C. K. In *Jebb v. Tugwell*, 24 L. J. Ch. 670, the Master of the Rolls ordered that an infant, who was born pending the suit and had not been brought before the Court by supplemental bill or otherwise, should be bound by the decree. And see the earlier cases of *Petre v. Petre*, 1 W. R. 362; *Morritt v. Walton*, 2 W. R. 544; *Hart v. Tulk*, id. 131.

\* 2060 \* 101. *Bill of revivor and supplement, another form. [Modern English Form.]*

Between W. L. and C. C., his wife . . . Plaintiffs,  
and  
W. R., A. S., and others . . . Defendants.

[*The bill<sup>1</sup> stated the will of the testator, appointing the defendants W. R. and J. S., deceased, executors, and contained statements as to legatees, and the deaths of several of them. It also stated the filing of the original bill by some of the legatees against the executors and residuary legatees, and a decree directing the usual accounts of the estate of the testator, with class and other inquiries. The bill then alleged that the decree had been carried into the Master's office; that certain accounts had been taken, but no report had been made.*]

"The plaintiffs further state, by way of supplement," &c. [*The bill then stated the deaths of the plaintiffs, and of several of the defendants, including J. S., one of the executors.*] "The said suit having become abated in manner aforesaid, no proceedings have been taken to revive the same."

[*The bill then set forth facts and circumstances for the purpose of charging the surviving executor, and the estate of the deceased executor represented by the defendant A. S., with wilful default, and of declaring certain purchases made by the surviving executor of portions of the testator's estate void, and the bill also contains the following general charge:—*]

The defendant W. R., and the said J. S., also, in many other respects, wasted and mismanaged the said testator's estate, and thereby occasioned very considerable loss thereto; and they have neglected to call in and receive various parts of such estate, and have allowed the same to remain outstanding upon insufficient security,<sup>2</sup> and have also retained large balances from time to time in their hands, without investing the same.

The plaintiffs have never received anything on account of the legacy bequeathed to the plaintiff C. L., by the said will, or in respect of any part of the residuary estate of the said testator, although, from time to time, since the abatement of said suit, they have made frequent applications to the defendant W. R. for an account of the real and

\* 2061 \* personal estate of the said testator, and for payment of what was due to them in respect thereof.

<sup>1</sup> Leggo v. Richards, V. C. Kindersley, 20th January, 1857, MSS. It is to be observed, that in this case the supplemental bill was filed by one of the *defendants* to the original bill and her husband, and was therefore sustainable, and not open to the objection (as it would have been if the plaintiff in the original suit had filed it), that, on the ground of the further relief sought, it was a supplemental bill in the nature of a bill of review, which cannot be filed without the leave of Court. Berrow v.

Morris, 10 Beav. 437; Hodson v. Ball, 11 Sim. 456; Taylor v. Taylor, 1 M. & G. 397.

A supplemental bill after decree should be in aid of the directions contained in the decree on the original suit. Wilson v. Todd, 1 M. & C. 42, 47.

<sup>2</sup> Caney v. Bond, 6 Beav. 486; Ratcliffe v. Winch, 17 Beav. 217; Buxton v. Buxton, 1 M. & C. 80; Hughes v. Empson, 22 Beav. 181; Bate v. Hooper, 5 De G. M. & G. 338.

The defendants W. R. and J. S. purchased or procured, to be transferred into their joint names, various large sums of bank annuities, forming a part of the testator's estate, a considerable part of which has been since sold out by the said W. R., and applied for purposes not sanctioned by the said testator's said will, and the defendant W. R. threatens and intends to sell out and apply, in like manner, the remainder of bank annuities.

*Prayer.*

The plaintiffs therefore pray as follows:—

*Prayer to revive.*] 1. That the said suit and proceedings which so became abated as aforesaid may stand and be revived, and be in the same plight and condition as the same were in at the time of the abatement thereof.

2. That the said decree made on the hearing of the said cause may be prosecuted and carried into effect, and that the plaintiffs may have the full benefit thereof.

3. That an account may be directed by this honorable Court of all the personal estate of the said testator, which would, but for the wilful neglect or default<sup>1</sup> of the said W. R. and J. S., or either of them, have come to their or either of their hands.

4. That the purchases<sup>2</sup> hereinbefore mentioned to have been made by the defendant W. R., of the said freehold and leasehold premises at —, may be declared to be void and of no effect; or that the said W. R. and J. S. may be declared bound to make good to the said testator's estate the full present value of such premises, and that all proper and necessary directions may be given, and inquiries made, to give effect to such declaration.

5. That in taking the account by the said decree, and hereinafter sought to be taken, the said W. R. and J. S. may be disallowed all costs, charges, and expenses incurred by them, or either of them, in consequence of their not having duly converted and invested the said testator's estate, pursuant to the directions of the said testator's will.

\* 6. That the defendant A. S. may admit assets of the said \* 2062 J. S. sufficient to meet what shall be found due from the said J. S., upon taking the said several accounts, or that all proper and necessary accounts may be taken of the personal estate and effects of the said J. S.

<sup>1</sup> The plaintiff should charge wilful default in the bill, and establish a *prima facie* case thereof at the hearing. *Shepherd v. Towgood*, Turn. & R. 379; *Garland v. Littlewood*, 1 Beav. 527. And the decree should either contain some declaration, or direct some inquiries with a view to determining the question as to the wilful default of the accounting party; otherwise the question will not be open on the cause coming on for further consideration. *Jones v. Morrall*, 2 Sim. N. S. 241; 21 L. J. Ch. 630. As to charging executor with *interest*, see Att-

Gen. v. Alford, 4 De G. M. & G. 843. As a general rule, an executor is not justified in carrying on the testator's trade except for purposes of winding up. *Collinson v. Lister*, 20 Beav. 356; 24 L. J. 762; 25 L. J. Ch. 38.

<sup>2</sup> See form of decree where a trustee purchases a trust estate at an alleged undervalue, and claims the benefit of permanent improvements. *Williamson v. Seaber*, 3 Y. & C. Exch. 717. For instructions to Master in such a case, see *Boynton v. Brastow*, 53 Maine, 367, 368.

7. That some proper person may be appointed to get in and receive the outstanding personal estate and effects of the said testator, with all proper and necessary directions in that behalf; and that the defendant W. R., his servants and agents, may be restrained, by the order and injunction of this honorable Court, from getting in and receiving any part thereof, and from selling out, parting with, or disposing of, except under the sanction of this Court, any part of the bank annuities now standing in his name as aforesaid, in the books of the Governor and Company of the Bank of England.

8. That, for the several purposes aforesaid, all necessary accounts may be taken, directions given, and inquiries made.

102. *Bill of revivor and supplement by the executors of the deceased plaintiff in the original bill against the administratrix and heiress-at-law of the deceased defendant, against whom the original bill had been exhibited for a foreclosure of a mortgage of freehold and leasehold property.*

To, &c.

Humbly complaining, show unto your honors the plaintiffs R. W., of, &c., and N. W., of, &c., executors, named and appointed in and by the last will and testament of H. W., late of, &c., gent., deceased, that, on or about the — day of —, the said H. W. exhibited his bill of complaint in this honorable Court against T. W., late of, &c., gent., deceased, thereby praying that the said T. W. might be decreed by this honorable Court to come to a just and fair account with the said H. W. for the principal and interest then due and owing to him on the mortgage security, in the said bill mentioned, and might pay the same to the said H. W. by a short day to be appointed by this honorable Court, together with his costs; and in default thereof, that the said T. W. might stand absolutely barred and foreclosed of and from all manner of benefit and advantage of redemption or claim in or to the residue of two several terms of five hundred years and four hundred years in the respective mortgaged premises in the said bill mentioned, and every part thereof. And the said defendant T. W. being duly served with process, appeared thereto, and departed this life on or about the — day of —, without having put in his answer to the said bill. And the plaintiffs show unto your honors, by way of supplement to the said original bill, that the said defendant T. W.

departed this life intestate, leaving his wife, E. W., a defendant \* hereinafter named, *enceinte* with a child since born and named A. W., and the said A. W. is now the sole heiress-at-law of the said T. W., deceased, and as such is entitled to the reversion and remainder of the freehold part of the said mortgaged hereditaments and premises, expectant upon the determination of the said term of five hundred years therein. And the plaintiffs further show, that on the — day of —, letters of administration of the goods, chattels, and effects of the said T. W., deceased, were duly granted unto his widow, the said E. W., who is thereby become his sole personal representa-

tive. And the plaintiffs show unto your honors that the said complainant H. W. departed this life on or about the — day of —, having previously duly made and published his last will and testament in writing, bearing date on or about the — day of —, and thereof appointed the plaintiffs joint executors, and on or about the — day of — the plaintiffs duly proved the said will in the proper Court, and took upon themselves the burden of the execution thereof. And the plaintiffs further show, that upon the death of the said H. W., the said several terms of five hundred years and four hundred years became, and the same are now, vested absolutely at law in the plaintiffs, as his personal representatives, subject, nevertheless, to redemption on payment of the principal money and interest thereby secured. And the plaintiffs further show unto your honors, that the said suit having become abated by the death of said T. W., the plaintiffs are advised that they, as the personal representatives of the said H. W., deceased, are entitled to have the same revived and restored as against the said E. W. and A. W., to the same plight and condition in which it was at the time of the death of the said T. W., and to have the same relief against the said E. W. and A. W. To THE END, therefore, &c.

And that the said E. W. and A. W. may answer the said original bill, and that they may be decreed by this honorable Court to come to a just and fair account with the plaintiffs for the principal and interest now due and owing to the plaintiffs on the said mortgage securities, and may pay the same to the plaintiffs by a short day to be appointed by this honorable Court, together with the plaintiffs' costs, &c., &c., and that the said suit may stand and be revived against the said defendants, and be in the same plight and condition in which the same was at the time of the decease of the said defendant T. W., or that the said E. W. and A. W. respectively may show good cause to the contrary; May it please, &c.

*Pray subpoena to revive and answer the original bill and supplemental bill against E. W. and A. W.*

\* *Supplemental Statement.*

\* 2064

In Chancery.

Between, &c.

[*Title of original cause.*]

Supplemental statement to be added to the original bill in this cause.

[*Here state the facts or circumstances which have occurred since the filing of the bill, and which the plaintiff is desirous of putting in issue.*<sup>1</sup>

<sup>1</sup> It is to be borne in mind, that if the plaintiff is entitled to amend his bill, it will not be necessary to file a supplemental bill, to put in issue any facts or circumstances which may have occurred after the institution of the suit; but they may be introduced by amendment; a

supplemental statement, therefore, is only necessary where the cause is in such a state that the plaintiff is not at liberty to amend his bill. *Ante*, Vol. II. pp. 1530, 1531; see *Peabody v. Norfolk*, 98 Mass. 452.

## SECTION XXXII.

*Bills of Review.*<sup>2</sup>103. *Bill of review for errors of law, apparent on the decree itself.*

To, &c.

Humbly complaining, sheweth unto your honors the plaintiff A. B., of, &c., that on the — day of —, W. S., of, &c., the defendant hereinafter named, exhibited his bill of complaint in this honorable Court against the plaintiff, and thereby set forth that, &c. [*here insert the original bill*]. And the plaintiff being served with the proper process for that purpose, appeared and put in his answer to the said bill, to the effect following [*here recite the substance of answer*]. And the said W. S. replied to the said answer, and issue having been joined, and witnesses examined, and the proofs closed [*or, the said W. S. joined issue on the answer and*], the said cause was set down to be heard, and was heard, before your honors, on the — day of —, when a decree was pronounced, which was afterwards passed, and entered, in which it was set forth and recited, that it was, at the hearing on the plaintiff's behalf, insisted that the plaintiff had, by his answer, set forth that, &c. [*here insert the recital and decree*]. And the said decree has since, and on or about the — day of —, been duly signed and enrolled; which said decree the plaintiff insists is erroneous, and ought to be reviewed, reversed, and set aside for many apparent errors and imperfections, inasmuch as it appears by \* 2065 \* the plaintiff's answer, set forth in the body of said decree [*here insert the apparent errors*]. And no proof being made thereof, no decree ought to have been made or grounded thereon, but the said bill ought to have been dismissed for the reasons aforesaid. In consideration whereof, and inasmuch as such errors and imperfections appear in the body of the said decree, and there is no proof on which to ground any decree to set aside the said rent-charge, the plaintiff hopes that the said decree will be reversed and set aside, and no further proceedings had thereon. To THE END, therefore, that the said W. S., &c.; and that for the reasons and under the circumstances aforesaid, the said decree may be reviewed, reversed, set aside, and no further proceedings taken thereon, and the plaintiff permitted to remain in the undisturbed possession and enjoyment of the said rent-charge.

May it please, &c.

[*Pray for subpoena in usual form.*]

<sup>2</sup> The Chancery jurisdiction to entertain a suit in the nature of a bill of review is not affected by the Judicature Acts, although leave to bring such a suit is now more usually ob-

tained by summons than by petition. *Falcke v. Scottish Imperial Ins. Co.* (No. 2), 57 L. T. 39; 35 W. R. 794.

104. *Bill of review on discovery of new matter.*

Humbly complaining, sheweth unto your honors the plaintiff A. B., of, &c., that on or about —, C. D., of, &c., the defendant hereinafter named, exhibited his bill of complaint in this honorable Court against the plaintiff, and thereby set forth that, &c. [*Here insert the original bill.*] And the plaintiff being duly served with process for that purpose, appeared and put in his answer to the said bill, to the effect following: [*Here state the substance of the answer.*] And the said C. D. replied to the said answer, and issue having been joined and witnesses examined, and the proofs closed [*or, the said C. D. joined issue on the answer, and*], the said cause was set down to be heard, and was heard before your honors, on the — day of —, when a decree was pronounced, whereby your honors decreed that the plaintiff's title to the premises was valid and effectual, after which the said C. D. petitioned your honors for a rehearing, and the said cause was accordingly reheard, and a decree of reversal made by your honors on the ground of the said C. D. being the heir-at-law of the said E. F., deceased, and which said decree of reversal was afterwards duly signed and enrolled, as by the said decree and other proceedings now remaining filed as of record in this honorable Court, reference being thereto had, will appear. And the plaintiff sheweth unto your honors, by leave of this honorable Court first had and obtained for that purpose, by way of supplement, that since the signing of the said decree of reversal, the plaintiff has discovered, as the fact is, that the said E. F. was, in his lifetime, seised in his demesne as of fee, of and in the hereditaments and premises in question in the said cause, and \* that \* 2066 the said E. F., while so seised, and when of sound mind, duly made and published his last will and testament in writing, bearing date on the — day of —, which was executed by him, and attested according to law, and thereby gave and devised unto the said J. W., his heirs and assigns forever, to and for his and their own absolute use and benefit, the said hereditaments and premises in question in the said cause (to which the plaintiff claims to be entitled as purchaser thereof from the said J. W.). And the plaintiff further sheweth unto your honors, that since the said decree of reversal was so made, signed, and enrolled, as aforesaid, and on or about —, the said C. D. departed this life intestate, leaving G. H., of, &c. (the defendant hereinafter named), his heir-at-law, who, as such, claims to be entitled to the said hereditaments and premises in exclusion of the plaintiff. And the plaintiff is advised and insists that, under the aforesaid circumstances, the said last-mentioned decree, in consequence of the discovery of such new matter as aforesaid, ought to be reviewed and reversed; and that the first decree, declaring the plaintiff entitled to the said hereditaments and premises, should stand, and be established and confirmed; and for effectuating the same, the said several proceedings, which became abated by the death of the said C. D., should stand and be revived against the said G. H., as his heir-at-law.

TO THE END, therefore, &c. And that the said suit may be revived against the said G. H., or that he may show good cause to the contrary, and that the said last decree, and all proceedings thereon, may be reviewed and reversed, and that the said first-mentioned decree may stand and be established and confirmed, and be added to, by the said will being declared a good and effectual devise of such hereditaments and premises, as aforesaid; and that the said G. H. may be decreed to put the plaintiff into possession of the said hereditaments and premises, and in the same situation, in every respect, as far as circumstances will now permit, as the plaintiff would have been in case such last decree had never been pronounced and executed; and that the plaintiff may have such other, &c. May it please, &c.

[*Pray subpœna to revive and answer against the said G. H.*]

*Bill in the Nature of a Bill of Review, where a Party is bound by a Decree.*

105. *Supplemental bill in the nature of a bill of review.* [*Commence as in preceding.*]

Whereby your honors decreed that, &c. [*state the effect of the decree*], as by the said proceedings and decree now remaining as of record, in this honorable Court, reference being thereunto had, will appear. And the plaintiff further sheweth unto your honors [*state the supplemental matter, by leave of the Court, &c.*] that the said decree has never hitherto been signed and enrolled, and in consequence of the discovery of such new matter as aforesaid, the plaintiff is entitled, as he is advised, to have the said cause heard thereon by your honors, when reheard on the said original bill (a petition for that purpose having been presented by the plaintiff, and acceded to by your Lordships) in the same manner as if such new matter had been put in issue in the said original suit. To the end, therefore, &c. [*Interrogate as to supplemental matters.*]

And that the said will may be established, and declared a valid and effectual devise of the said hereditaments and premises, and that the said cause may be heard on such new and supplemental matter as aforesaid, at the same time that it is reheard on the said original bill; and that the plaintiff may have such further and other relief as, under the circumstances hereinbefore particularly mentioned to your honors, shall seem meet, and the nature of this case, as it hereby appears, may require. May it please, &c.



## SECTION XXXIV.

*Bill to suspend a Decree.*

106. *To enlarge the time of performance of a decree on the ground of inevitable necessity, which prevented a party from complying with the strict terms of it.*

Humbly complaining, sheweth unto your honors the plaintiff A. B., of, &c., that the plaintiff, on the — day of —, borrowed the sum of £— from C. D., of, &c., the defendant hereinafter named, and in order to secure to the said C. D. the repayment thereof, with legal interest, the plaintiff, by an indenture, bearing date the — day of — [*set forth the mortgage*], bargained, sold, and conveyed unto the said C. D. the real estate named and described in the said indenture, subject to redemption, on payment by the plaintiff of the said sum of £— and \* interest, as therein mentioned, as by the said inden- \* 2068 ture, reference thereto being had, will more fully appear. And the plaintiff further sheweth, that the said C. D., on or about —, exhibited his bill of complaint to this honorable Court against the plaintiff, for payment of what was then due to him for principal and interest on the said security, by a short day to be appointed for that purpose, or that the plaintiff might be absolutely debarred and foreclosed from all right and equity of redemption in the said mortgaged premises; and the plaintiff having put in his answer thereto, and submitted to pay what should appear to be due from him, the said cause came on to be heard before this honorable Court, on or about —, when it was referred to R. V., one of the Masters of this honorable Court, to take an account of what was so due from the plaintiff to the said C. D., as aforesaid, and the plaintiff was ordered to pay the same on the — day of —, or to be absolutely foreclosed of all right and equity of redemption in the said mortgaged premises, as by the said proceedings now remaining as of record in this honorable Court, reference being thereto had, will appear. And the plaintiff further sheweth unto your honors, that the plaintiff was duly prepared, and was ready to pay what should be reported to be due from him; but, before the said Master made his report, the plaintiff was sent in great haste, by the commands of his Majesty, Ambassador to the Court of Paris, on special and weighty affairs of State, which admitted of no delay; and the plaintiff was, therefore, unable to make any provision for the payment of what should be so found due from him as aforesaid. And the plaintiff further sheweth unto your honors, that the said Master, during the plaintiff's absence, made his report, whereby he found that the sum of £— was due to the said C. D. for principal and interest from the plaintiff, but no further proceedings have since been taken in the said cause. And the plaintiff being ready and willing to pay the said sum of £— to the said C. D., and all subsequent interest thereon, is advised, that, on payment thereof, he is entitled, under the circumstances aforesaid, to have so much of the said decree as relates to the foreclosure of the

plaintiff's right and equity of redemption in the said mortgaged premises, suspended, and on payment thereof, to have a reconveyance of the said mortgaged premises from the said C. D., &c. To THE END, therefore, &c. And that the subsequent interest on the said sum of £—, so reported to be due from the plaintiff, as aforesaid, to the present time, may be computed by the direction of this honorable Court, and that on the payment of the said sum of £—, and such interest as aforesaid, the said decree of foreclosure may be suspended, and the said C. D. directed, at the expense of the plaintiff, to reconvey the said mortgaged premises to the plaintiff, or as he shall appoint, freed and absolutely discharged from the said mortgage. [*And for further relief.*] May it please, &c.

*Bill to set aside a Decree obtained by Fraud.<sup>1</sup>*

107. *Bill to set aside a decree of foreclosure fraudulently obtained, and for redemption.*

Humbly complaining, sheweth unto your honors the plaintiff A. B., of, &c., that T. B., of, &c., deceased, the plaintiff's late father, during his life, and on or about the — day of —, was seised in his demesne, as of fee, of and in the real estate hereinafter particularly described; and by indenture of that date, made between the said T. B. of the one part, and C. D., of, &c., the defendant hereinafter named, of the other part, the said T. B., in consideration of \$—, bargained, sold, and conveyed unto the said T. B., his heirs and assigns, all, &c. [*describe the mortgaged premises*], subject to redemption on payment of the said principal money and lawful interest at the time therein mentioned, and long since past; as by the said indenture, reference being thereto had, will more fully appear. And the plaintiff further sheweth, that the said T. B. departed this life on or about —, leaving the plaintiff his heir-at-law, and only child, then an infant under twenty-one years of age; that is to say, of the age of seven years or thereabouts, him surviving. And the plaintiff further sheweth, that during the plaintiff's minority, on or about —, the said C. D. filed his bill of complaint in this honorable Court against the plaintiff, for a foreclosure of the plaintiff's right and equity of redemption in the said mortgaged premises; but the plaintiff was not represented in such bill

<sup>1</sup> See *Patch v. Ward*, L. R. 3 Ch. 203. A bill to annul a decree obtained by fraud ought, ordinarily, by analogy with the period fixed by statute for the suing out of writs of review as of right, or the filing of petitions for review of judgments in civil actions, to be filed within one year from the discovery of the fraud. *Evans v. Bacon*, 99 Mass. 213. A plaintiff in a bill to redeem land, who on discovering upon the docket the entry of a decree dismissing

his bill, files a petition to annul it, which, after a hearing of the parties, is denied, cannot maintain a bill, which he delays without explanation, to file until two years and four months afterwards, to set aside the decree on the ground that it was obtained by fraud, but must be deemed to have waived his rights in that respect, although it does not appear that his petition was not dismissed for mere defect of form. *Evans v. Bacon*, *supra*.

to be then an infant; and the said C. D. caused and procured one L. M., since deceased, who acted in the management of the affairs of the plaintiff's said father, to put in an answer in the name of the plaintiff, and without ever acquainting the plaintiff, or any of his friends or relations therewith; in which said answer a much greater sum was stated to be due from the plaintiff, on the said mortgage security, to the said C. D., than in fact was really owing to him, and for which it was untruly stated that the said mortgaged premises were an insufficient security: and in consequence of such answer being put in, the said C. D. afterwards, in conjunction with the said L. M., on or about —, obtained an absolute decree of \* foreclosure \* 2070 against the plaintiff, which the plaintiff has only lately discovered, and of which the plaintiff had no notice, and in which said decree no day is given to the plaintiff, who was an infant when the same was pronounced, to show cause against it when he came of age; as by the said proceedings, now remaining as of record in this honorable Court, reference thereto being had, will more fully appear. And the plaintiff further shows that the plaintiff, on the — day of — last, attained the age of twenty-one years, and shortly afterwards, having discovered that such transactions had taken place during his minority as aforesaid, by himself and his agents, represented the same to the said C. D., and requested him to deliver up possession of the said mortgaged premises to the plaintiff, on being paid the principal money and interest, if any, actually and fairly due thereon, which the plaintiff offered, and has at all times been ready to pay, and which would have been paid by the personal representatives of the said T. B., out of his personal assets, during the plaintiff's minority, had any application been made for that purpose. And the plaintiff hoped that the said C. D. would not have insisted on the said decree of foreclosure, so fraudulently obtained as aforesaid, but would have permitted the plaintiff to redeem the said mortgaged premises, as he ought to have done. But now so it is, &c., the said C. D., &c., pretends that the said decree of foreclosure was fairly and properly obtained, and that a day was therein given to the plaintiff, when of age, to show cause against the same, and that the plaintiff has neglected to do so, and that the plaintiff is neither entitled to redeem, nor to travel into the said accounts; whereas the plaintiff charges the contrary thereof to be true, and that the plaintiff only attained the age of twenty-one years on the said — day of —, and that he has since discovered the several matters aforesaid, by searching in the proper offices of this honorable Court; and the plaintiff expressly charges that, under the circumstances aforesaid, the said decree, so fraudulently obtained, as hereinbefore mentioned, ought to be set aside, and the plaintiff ought not to be precluded thereby, or in any other manner, from redeeming the said mortgaged premises, of which the said C. D. has possessed himself, by such means as aforesaid. All which actings, &c. In consideration whereof, &c. To the end, &c.; and that the said decree of foreclosure may, for the reasons and under the circumstances aforesaid, be set aside by this honorable Court, and declared to

be fraudulent and void; and that an account may be taken of what, if anything, is now due to the said C. D. for principal and interest on the said mortgage; and that an account may also be taken of the rents and profits of the said mortgaged premises, which have, or without his wilful default might have been, received by or on behalf of the said C. D., and if the same shall appear to have been more than the principal and interest due on the said mortgage, then that the residue thereof may be paid over to the plaintiff, and that the plaintiff \* 2071 may be at liberty \* to redeem the said mortgaged premises, on payment of the principal and interest, if any, remaining due on the said security; and that the said C. D. may be decreed, on being paid such principal money and interest, to deliver up possession of the said mortgaged premises, free from all incumbrances, to the plaintiff, or as he shall appoint, and to deliver up all title-deeds and writings relating thereto. [*General relief.*] May it please, &c. [*Prayer for subpoena against C. D., &c.*]

## SECTION XXXVI.

*Bill in the Nature of a Bill of Revivor.*

108. *Where there has been a devise of real estate, against a vendee for the specific performance of an agreement.*

The plaintiff A. B., of, &c. That the plaintiff, on or about —, filed his bill of complaint in this honorable Court against C. D., of, &c., thereby stating [*see form of specific performance of an agreement*]. [*Set forth the material part of the bill and the prayer.*] That the said C. D. being served with process of *subpœna*, appeared to the said bill, but before he put in his answer thereto, he, the said C. D., departed this life, having first, when of sound mind, duly made and published his last will and testament in writing (which was executed by him, and attested as by law is required for passing real estates by devises), and thereby gave and devised all his real estates (comprising the estate so agreed to be sold by him to the plaintiff as aforesaid) to E. F., of, &c. (the defendant hereinafter named), his heirs and assigns forever, as by the said will, reference being thereunto had, will appear. And the plaintiff further sheweth unto your honors, that the said suit became abated by the death of the said C. D.; but, notwithstanding, the plaintiff is advised that he is entitled to have the said agreement specifically performed by the said E. F. as such devisee as aforesaid; and which said devise the plaintiff expressly charges is in every respect valid and effectual: To the end, therefore, &c. And that the plaintiff, under the circumstances aforesaid, may have all such benefit against the said E. F. of the said suit, so commenced as aforesaid, as he would have had in case the said C. D. had been living, or that the said E. F. may show good cause to the contrary. May it please, &c. [*Subpœna.*]

## \* SECTION XXXVII.

\* 2072

*Bill to carry a Decree into Execution.*<sup>1</sup>109. *Where a decree of partition has been obtained and not executed.*

Humbly complaining, sheweth unto your honors the plaintiff A. B., of, &c., that the plaintiff, on or about the — day of —, filed his bill of complaint in this honorable Court against E. B., stating [*set out substance of a bill for partition*] and praying [*set out prayer verbatim*]. And the plaintiff further sheweth, that due process having been served upon the said E. B., he appeared and put in his answer to said bill, to which answer a replication was filed [*or, on which answer issue was joined*]. And the said cause being duly at issue, the same came on to be heard, and was heard, before your honors on the — day of —, when your honors were pleased to order and decree that a commission should issue to certain commissioners to be therein named, to make partition of the estate in question, who were to take the depositions of witnesses to be examined by them, in writing, and return the same with the said commission; and that the said estate was to be divided and separated, and one-third part thereof set out in severalty and declared to belong to the said E. B. and his heirs; and the remaining two thirds thereof, declared to belong absolutely to the plaintiff, to be held in severalty by him; and the respective parties were decreed to convey their several shares to each other, to hold in severalty according to their respective undivided shares thereof; and that it should be referred to H. R., one of the Masters of this Court, to settle the conveyances, in case the parties differed about the same; as by the said proceedings and decree now remaining as of record in this honorable Court, reference being thereunto had, will more fully appear. And the plaintiff further sheweth unto your honors, that the commission awarded by the said decree never issued, on account of the said E. B. going abroad, and being, until lately, out of the jurisdiction of this honorable Court; but the said E. B. having since returned, and the inconvenience mentioned in the plaintiff's former bill [*for partition*] still subsisting, the plaintiff is desirous of having the said decree forthwith carried into execution, but from the great length of time which has elapsed, and the refusal of the said E. B. to concur therein, the plaintiff is advised the same cannot be done without the assistance of this honorable Court. TO THE END, therefore, &c. And that the said decree may be directed to be forthwith carried specifically into execution, and the said E. B. ordered to do and concur in all necessary acts for that purpose. May it please, &c. [*Prayer for subpoena against E. B.*].

<sup>1</sup> For case of a petition for the enforcement of a decree, see *Davis v. Parker*, 14 Allen, 105, 106.

*Cross-Bill.*110. *Cross-bill by an administrator de bonis non of a deceased executor, to have a general release executed, &c.*

Humbly complaining, sheweth unto your honors, the plaintiff T. B., of, &c., administrator of the goods and estate which were of R. H., late of, &c., deceased, at the time of his death, left unadministered by M. H., late of, &c., in her lifetime, now deceased, and which said M. H. in her lifetime, and at the time of her death, was administratrix of the goods and estate which were of the said R. H., deceased, at the time of his death; that J. M., late of, &c., deceased, when of sound mind, duly made his last will and testament in writing, and thereby, after bequeathing several pecuniary legacies, gave the residue of his goods and estate, subject to the payment of his debts, to his daughter H., then an infant under the age of twenty-one years, but now the wife of J. C., of, &c. (and which J. C. and H. his wife, are two of the defendants hereinafter named), and thereby appointed R. P., of, &c. (another defendant hereinafter named), and the said R. H., executors of his said will; as by the said will, reference being thereunto had, will more fully appear. And the plaintiff further sheweth unto your honors, that the said testator died on or about the — day of —, without altering or revoking his said will, leaving his said daughter H. him surviving; and upon, or soon after his decease, the said R. P. and R. H., as such executors as aforesaid, duly proved the said will in the proper Court, and the said R. P., who principally acted in the execution of the said will (the said R. H. having only interfered for the sake of conformity) under and by virtue of such probate, possessed himself of a considerable part of the said testator's goods and effects.

And the plaintiff further sheweth unto your honors, that the said R. H. departed this life on or about —, and shortly after his decease letters of administration were duly granted to the said M. H., his wife, who died on or about —; and after her decease such letters of administration of the unadministered goods and estate of the said R. H., deceased as aforesaid, were duly granted to the plaintiff by the proper Court of Probate, as by such letters of administration, reference being thereunto had, will appear.

And the plaintiff further sheweth unto your honors, that the said R. H., previously to his death, accounted for and paid to the said R. P. as such co-executor as aforesaid, all such part of the estate of the said testator as had been received by him, the said R. H., as such executor as aforesaid, and no part of the said estate remained in the hands of the said R. H. at the time of his decease, previously whereto  
 \* 2074 \* the said R. H. resided in the country, where his house was robbed, and all papers relative to his acts as such executor as aforesaid, and for which he had accounted as hereinbefore mentioned, were stolen, and have never hitherto been recovered.

And the plaintiff further sheweth unto your honors, that the said J. C. and H. his wife, duly intermarried previously to the said H. attaining the said age of twenty-one years, which she has since done, and after that period the said R. P. duly accounted for the residue of the said testator's estate with the said J. C. (who in the right of said H., his wife, became entitled to receive the same), and thereupon obtained a general release from the said J. C. and H. his wife, of all demands in respect thereof, as by the said release, reference being thereunto had, will appear. And the plaintiff hoped under the circumstances aforesaid, he would not have been called upon for any account of the administration of the said testator's estate. But now so it is, may it please your honors, &c., that the said J. C. and H. his wife, &c., have lately filed their bill in this honorable Court against the plaintiff as such representative of the said R. H., deceased, as aforesaid, for an account of the estate of the said testator J. M. received by the said R. H., deceased, in his lifetime, as such executor as aforesaid, thereby praying that the plaintiff may be decreed to pay the said J. C., in right of his wife, what, upon such account, shall appear to be due to the said J. C., in right of the said H., his wife, out of the assets of the said R. H.; and to which said bill they have made the said R. P. a defendant, without praying any account or relief against him. And they pretend that there are various receipts and accounts [*particularizing those charged in the original bill*] of the said R. H., deceased, as such executor as aforesaid, as to the estate of the said testator, which remained unaccounted for by the said R. H. at his decease, and which ought to be paid by the plaintiff. Whereas the plaintiff charges the contrary thereof to be true [*negating specifically the pretended receipts and accounts*]; and that an account was stated, and a settlement of accounts took place between the said R. H., previously to his death, and the said R. P., and that an account has likewise been stated and settled by and between the said R. P. as such surviving executor as aforesaid, and the said J. C. in right of the said H., his wife, since she attained the age of twenty-one years as aforesaid; and that no demand was ever made on the estate of the said R. H. in respect of his accounts, until lately, when the loss of such papers as aforesaid was discovered, and of which loss the plaintiff charges an undue advantage is intended and attempted to be taken; and the plaintiff also charges, that the said R. P. abets the said J. C. and H. his wife in their proceedings, and refuses to indemnify the personal estate of the said R. H., in respect of his accounts in the execution of the will of the said testator J. M. so accounted for by him, and settled with the said R. P. as aforesaid; \*and the \* 2075 said R. P. also refuses to inform the plaintiff what he knows of the matters aforesaid, or any of them, and also denies such statements as have been made by him relative thereto. All which actings, &c. In tender consideration whereof, &c. To THE END, therefore, &c. And that the said J. C. and H. his wife may be decreed to execute to the plaintiff, as such administrator of the goods and estate of the said R. H., deceased, left unadministered by the said M. H., also deceased,

at the time of her death, a general release of all claims and demands upon such unadministered estate and effects of the said R. H., deceased as aforesaid, in respect of all the accounts of the said R. H. in the execution of the will of the said testator J. M.; or that an account may be taken of the said estate of the said testator J. M., received by the said R. H., and of his application thereof; the plaintiff being willing and hereby offering to pay what (if anything) shall appear to be due on the balance of such account; and that the said R. P. may be decreed to indemnify the estate of the said R. H., and the plaintiff, as such administrator thereof as aforesaid, in respect of such part thereof as the said R. H. paid to, or by the order, or for the use of the said R. P., or otherwise to account for and pay the same to the plaintiff. And that the said J. C. and H. his wife may be decreed to pay to the plaintiff his costs of this suit. And that the plaintiff may have such other and further relief, &c. May it please, &c.



## SECTION XXXIX.

## INFORMATIONS.

111. *Information to restrain the making a carriage road and breaking up a public foot-path, in order to prevent certain streets from being made thoroughfares for carriages contrary to the intention of a statute.*

INFORMING, sheweth unto your honors, C. I. R., of, &c., Esq., Attorney-General of the State [or Commonwealth] of, &c., at and by the relation of A. B., &c., &c., against D. Y., &c., &c., that there is situate, lying, and being within the town of —, a certain public street, called V. Lane, leading from a certain other public street, called B. Street, to a certain other public street, called G. Street, and communicating on the north side thereof with certain other public streets, called C. Street, old B. Street, and S. Row. And the Attorney-General aforesaid, by the relation aforesaid, further sheweth that at the east end of the said street called V. Lane, there is a certain other public street, called S. Street, leading from thence into a certain other public street, called P. Street, and that along the south side of said street, called V. Lane, from S. Street to B. Street, there is, and for years past has been, a common and public foot-path, which has been from time to time paved with flag-stones at the expense of the inhabitants of the said town of —, for the convenience of persons passing and repassing on foot, the said street called V. Lane, being a great public thoroughfare for foot-passengers from B. Street to S. Street, although there is not nor ever has been any thoroughfare for carriages along the said street from B. Street to S. Street, by reason of certain wooden posts, which are, and ever since the making of the said street, called V. Lane, have been placed across the said street a few feet to the eastward of S. Row. And the Attorney-General aforesaid by the relation aforesaid sheweth that the said common and public footway from B. Street to S. Street is and ever since the making of the same has been bounded on the south for the most part by a certain ancient brick wall, which forms the northern fence and boundary of certain lands called M. Gardens and B. Gardens, and that there is not nor ever has been any public way or opening on the north side of the said footway, so that the people of the — in passing and repassing on the footway have at all times \* had the free and uninterrupted use thereof without \* 2077 any hurt, hinderance, or obstruction whatsoever. And the Attorney-General aforesaid by the aforesaid relation further sheweth that

upwards of — years since, the then owners of the said lands called M. Gardens and B. Gardens, severally claimed a right to open a public street or way from P. through their respective lands into the said street, called V. Lane, and threatened to make a public street or streets accordingly, but such claim being resisted on the part of the proprietors and inhabitants of the said several streets, called V. Lane, C. Street, Old B. Street, and S. Row, by reason of the disturbance and injury that would thereby be occasioned to the said several streets, the said owners of the said lands thought fit to abandon such claim, and afterwards by an act of the — made and passed on the — day of —, entitled "An Act," &c., it was provided, &c., which provision was inserted in the said Act for the purpose of protecting the said streets called V. Lane, S. Row, C. Street, and Old B. Street, from any thoroughfare for carriages from P. to the said street called V. Lane, by the way of S. Street or by any other means than by the way of B. Street. And the Attorney-General aforesaid by the relation aforesaid further sheweth that the said D. Y., proprietor of the said lands called M. Gardens, and the defendant hereinbefore named, has formed a plan for making, and is about to make, a public street or way for horses, carts, and carriages, from P. through the said lands called M. Gardens and the public street called V. Lane, over the aforesaid common and public footway on the south side of the said street; and in and towards the execution of such plan has actually made an opening in the said ancient boundary wall, and has taken up a part of the flag pavement of the said footway. And the said Attorney-General at the aforesaid relation further sheweth, that such public street or way so intended to be made by the said defendant D. Y., if carried into execution, will greatly interrupt and obstruct the said common and public footway on the south side of the said street, called V. Lane, and will be to the great damage and common nuisance of all the people of —, passing and repassing by the said footway. And the Attorney-General aforesaid at the relation aforesaid further sheweth, that such intended street, if carried into execution, will be opposite to the end of S. Row and westward of the said wooden posts, so as aforesaid placed across the said street called V. Lane, and by making a direct thoroughfare for horses, carts, and carriages from P. into the said street called V. Lane, will actually defeat the provision made as aforesaid in the said Act for the protection of the said streets called V. Lane, S. Row, C. Street, and Old B. Street, from any thoroughfare for carriages, and will therefore be contrary to the true intent, meaning, and spirit of the said Act. To THE END, therefore, that the said D. Y. may, according to the best of his knowledge, remembrance, information, and belief, &c.

\* 2078 \* And that the said defendant may answer the premises; and that the said defendant, his agents, servants, and workmen, may be restrained by the order and injunction of this honorable Court from proceeding to make and open any public street or way from the said lands called M. Gardens into the said street called V. Lane, over the said common and public footway; and that the said defendant may be directed to replace the flag-stones of the said footway so as aforesaid removed by him or by his order, and to put the same footway into the

same state and condition as the same was in before his obstruction aforesaid. [*And for further relief.*]

J. L.

112. *Information at the relation of certain freeholders and inhabitants of a parish, forming a society called "The Twenty-Four," by whom the affairs of the parish were managed, to establish a bequest of stock for the benefit of the poor of a certain district within the same parish, praying also to have the stock transferred into the — name of —*

In Chancery.

To, &c.

Informing, sheweth your honors, C. I. R., of, &c., Esq., Attorney-General of the State of [*or Commonwealth*] of, &c., at and by the relation of E. C. R., W. G., &c., &c., all house-keepers and inhabitants, having freehold estates within the parish of T., in the county of N., that there has been from time immemorial within the said parish a certain society consisting of twenty-four persons, being house-keepers and inhabitants, and having freehold estates within the said parish, and which said society has always been, and still is, called or known by the name or description of "The Twenty-Four;" twelve of which twenty-four have from time immemorial been elected or chosen out of the principal inhabitants having freehold estates within the township or district of N. S., within the said parish, and the remaining twelve out of the principal inhabitants having freehold estates within the rest of the said parish, commonly called the country part of the said parish, the said twenty-four persons having constantly had the direction and management of the business and concerns of the said parish. And the Attorney-General aforesaid, at the relation aforesaid, also informeth your honors, that, upon the death of any one or more of the said society, or in case of his or their selling or disposing of his or their freehold or freeholds within the said parish, the survivors and others of the said society have been from time to time, whereof the memory of man is not to the contrary, used and accustomed to elect and choose, and have accordingly elected and chosen, on the — day of — following such event, some other person or persons to be a member or \*members of the \* 2079 said society in the room or stead of the person or persons so dying or disposing of his or their freehold as aforesaid. And the Attorney-General aforesaid, at the relation aforesaid, further informeth your honors, that the relators and H. H., late of W., in the county of N., Esq., were the persons who were last elected or chosen as members which composed the said society; and the said H. H. having lately departed this life, your relators are the surviving and present members of the said society. And the Attorney-General aforesaid, at the relation aforesaid, further informeth your honors that M. R., late of, &c., widow, deceased, in her lifetime duly made and published her last will and testament in writing, bearing date on or about the — day of —, and thereby amongst other things appointing R. J. and P. P., of, &c., Esqs., executors thereof, she gave and bequeathed unto her said executors in

the words and figures or to the purport and effect following, that is to say: "I give, devise, and bequeath unto the said P. P. and R. J., and the survivor of them, and the executors and administrators of such survivor, the sum of \$—, East India annuities, part of which is now standing in my name in the banks of that company, in trust that they, my said trustees and the survivor of them, and the executors and administrators of such survivor, do and shall pay to, authorize, and permit and suffer the house-keepers and inhabitants of the township of N. S., commonly called 'The Twenty-Four,' for the time being forever, to receive the dividends, produce, and interest of the said sum of \$—, East India annuities, as and when the same shall become due and payable, in trust to be by them or any five or more of them, paid, applied, and disposed of from time to time forever, unto and amongst such of the poor of the said township as they shall think proper;" as in and by such will and the probate thereof, relation being thereunto had, will more fully appear. And the Attorney-General aforesaid, at the relation aforesaid, further informeth your honors, that the said testatrix M. R. departed this life on or about the — day of —, without revoking or altering her said will, and upon or soon after her death the said P. P. and R. J. duly proved the said will in the appropriate Court, and undertook the executorship thereof. And the Attorney-General aforesaid, at the relation aforesaid, further informeth your honors that the said testatrix M. R. was at the time of her death possessed of or entitled unto a considerable personal estate, consisting of many valuable particulars, and particularly she was possessed of or entitled unto a considerable sum of money in East India annuities to a much larger amount than the said legacy; and upon or shortly after her decease, the said P. P. and R. J., by virtue of the said will and the probate thereof, possessed themselves of all the said personal estate and effects, and procured the said East India annuities to be transferred into their names.

And the Attorney-General aforesaid, at the relation aforesaid, \* 2080 further informeth your honors that the personal \* estate and effects late of or belonging to the said testatrix, and possessed by her said executors since her decease, were more than sufficient (exclusive of the said East India annuities) for the payment of all her debts, funeral expenses, and legacies, all which debts, funeral expenses, and legacies, save the aforesaid charitable legacy, have been long since fully paid and discharged; and the said East India annuities now remain standing in the names of the said P. P. and R. J., to answer and satisfy the aforesaid legacy. And the Attorney-General aforesaid, at the relation aforesaid, further informeth your honors that your relators being the persons meant and intended in the said testatrix's will mentioned, of the house-keepers and inhabitants of the township of N. S. commonly called "The Twenty-Four," hoped that the said P. P. and R. J. would have paid and applied the interest or dividends of the said East India annuities for the benefit of such person or persons as are entitled thereto by virtue of the said testatrix's will. BUT NOW SO IT IS, may it please your honors, the said P. P. and R. J. decline to pay the interest or dividends of the said sum of \$ — East India annuities unto

your relators, to be applied according to the direction or the said testatrix's will, alleging that they cannot do so with safety to themselves without the direction of this honorable Court for their indemnity therein. And the Attorney-General aforesaid charges that the charitable intentions of the said testatrix are in danger of being frustrated in process of time, when, after the deaths of the said defendants, it may be difficult to find out who are or who may be the personal representatives of the said testatrix, in order to obtain a representation to her, and the obtaining or procuring a representation to her will be attended with considerable expense, and therefore the said Attorney-General and the said relators charge that the said sum of money in annuities aforesaid ought to be transferred into the name of the — of this honorable Court upon the trusts and for the purposes aforesaid. To THE END, therefore, that the said P. P. and R. J. may upon their several and respective corporal oaths, &c., &c.

And that the aforesaid charity may be established; and that the said P. P. and R. J. may be decreed to transfer the before-mentioned sum of \$ — in East India annuities into the name of the — of this honorable Court, upon the trust and for the purpose mentioned and expressed in the said testatrix's said will concerning the same, and that the trust thereof may be declared accordingly; and that the interest or dividends which have become due thereon since the death of the said testatrix, and which may hereafter become due thereon, may from time to time forever hereafter be paid to the relators and their successors, the twenty-four of the house-keepers and inhabitants of the said township of N. S., to be applied in the manner by the said testatrix's will directed, and that such further and other directions may be given for the establishment and maintenance of the said charity as to your honors may seem meet and this case may require. May it please, &c.

2069

SECTION XL.

INTERROGATORIES.<sup>1</sup>

ACCORDING to the present English practice, the bill of complaint contains no interrogatories for the examination of the defendant. But if the plaintiff requires an answer from any defendant, he must file interrogatories for that purpose within eight days after the time limited for the appearance of such defendant; and no defendant will be required to answer a bill until interrogatories shall have been so filed.

113. *The form of such interrogatories is prescribed in the general orders of 7th August, 1852, as follows:—*

In Chancery.

JOHN LEE . . . . .	Plaintiff.
JAMES STYLES . . . . .	} Defendants.
and	
HENRY JONES . . . . .	

Interrogatories for the examination of the above-named defendants, in answer to the plaintiff's bill of complaint.

1. Does not the defendant Henry Jones claim to have some charge upon the farm and premises comprised in the indenture of mortgage of the first of May, one thousand eight hundred and fifty, in the plaintiff's bill mentioned?

2. What are the particulars of such charge, if any, the date, nature, and short effect of the security, and what is due thereon?

3. Are there or is there any other mortgages or mortgage, charges or charge, incumbrances or incumbrance, in any or what manner affecting the aforesaid premises or any part thereof?

4. Set forth the particulars of such mortgages or mortgage, charges or charge, incumbrances or incumbrance; the date, nature, and short effect of the security; what is now due thereon, and who is or are entitled thereto respectively, and when and by whom, and in what manner, every such mortgage, charge, or incumbrance was created.

The defendant James Styles is required to answer all these interrogatories.

<sup>1</sup> As the decree emanates from the Judge, it is binding, although all the interrogatories submitted to a jury were not answered. *Mantle v. Noyes*, 5 Mont. 274.

The defendant Henry Jones is required to answer the interrogatories numbered 1 and 2.

Y. Y.

[*Name of Counsel.*]

\* 114. *As to a deed.*

\* 2082

Was not the indenture or deed of the — day of —, in the plaintiff's bill mentioned, or some and what other indenture or deed, of some and what other date, made between the several persons, and whether or not to the purport and effect in the plaintiff's bill in that behalf mentioned and set forth, or between some and what other persons, or to some and what purport and effect?

115. *As to documents.*

1. Have not or has not the defendants, or some or one and which of them, now, or had not they, or some or one or which of them, heretofore and when last in their, or some or one and which of their, possession or power, or in the possession or power of their, or some or one and which of their, solicitors or solicitor, agents or agent, and whom by name, some and what deeds or deed, agreements or agreement, accounts or account, books of account or book of accounts, cash books or cash book, or other books or book, letters or letter, bills or bill of costs, receipts or receipt, vouchers or voucher, memoranda or memorandum, or some and what other documents or document, paper writings or paper writing, or some and what copies or copy, or extracts or extract of or from the several particulars aforesaid, or some or one and which of them, referring or relating to the several matters hereinbefore stated, or to some of them, and would not the truth of such matters, or of some and which of them, appear by such particulars if the same were produced?

2. Let the defendants severally set forth a full, true, and perfect list or schedule of all such particulars, distinguishing those which now are from those which once were, but are not now, in their respective possession or power.

116. *As to personal estate.*

1. Set forth a full, true, and particular account of all the personal estate [not specifically bequeathed<sup>1</sup>], or of which the testator — died possessed or entitled, and the particulars whereof the same consisted at the time of his death, and the true and utmost value thereof, specifying the amount of cash in the testator's house, at his banker's or elsewhere, and the debts or sums of money owing to him, and from whom respectively; and set forth what part or parts of the said testator's personal estate has or have been received by the defendants —

<sup>1</sup> The passage within brackets should be omitted, if it is supposed that the personal estate is not sufficient for payment of debts.

and —, or either and which of them, or any person or persons, and whom, by name, by their or either of their order, or for their or either of their use.

\* 2083 \* 2. Also set forth the respective amounts of the said testator's funeral and testamentary expenses, and of his debts and the several particulars thereof respectively, and the several amounts paid by the defendants, or either and which of them, for or in respect of the funeral and testamentary expenses of the said testator, and of his debts respectively.

3. Set forth an account of all and every the sum and sums of money paid, and when and by whom and to whom, for or in respect of the several legacies bequeathed by the will of the testator.

4. Set forth the amount of the clear residue of the said testator's personal estate, and how the same and every part thereof is invested, and in whose hands the same and each and every or any part thereof is.

5. Set forth whether the debts due to the said testator, or any and which of them, or any other and what part or parts of his personal estate are or is unreceived, unenumerated, or outstanding, and how and upon what security or securities, and why have the same debts and such other personal estate not been respectively received, converted, or gotten in.

117. *Interrogatories to a bill by a purchaser against a vendor for specific performance of a contract for sale of a freehold estate.*

1. Whether he [the vendor] was not seised and possessed of, or otherwise well entitled unto, the said freehold messuage or tenement, with the out-buildings, pleasure grounds, pasture lands, and other the appurtenances thereto adjoining or belonging, and the inheritance in fee-simple thereof? and

2. Whether, being so seised and entitled as aforesaid, he did not, at the time hereinbefore in that behalf mentioned, or at some other and what time, cause all the said estate and hereditaments to be put up to sale by public auction by the said Mr. W., at —, in three lots, pursuant to printed particulars and conditions of sale previously advertised and published thereof? and

3. Whether the said premises were not bought in by him the said defendant at the time of the said sale, or how otherwise? and

4. Whether the plaintiff did not, in or about the said month of April, or when else, enter into a treaty with the said defendant for the absolute purchase of the same estate and premises, together with the timber and other trees, fixtures, and other effects, in and about the same, discharged from all incumbrances, at or for the price or sum of \$—, or at some other and at what price? and

5. Whether the said defendant did not agree to accept the said sum of \$— as the consideration for the said estate and premises? and

\* 2084 \* 6. Whether thereupon such agreement in writing of such date, or of or to such purport and effect as hereinbefore in that



behalf mentioned, was not duly entered into and signed by the respective solicitors for the plaintiff and the said defendant, in the name and on the behalf of the plaintiff and the said defendant, or how otherwise? and

7. Whether the plaintiff did not, previously to the signing of the said agreement, pay the said defendant the sum of \$——, as a deposit, and in part of his said purchase-money, or sum of \$——? and

8. Whether the said defendant hath not since delivered up possession of the said purchased premises to the plaintiff? and

9. Whether the plaintiff hath not always been ready and willing to perform his part of the said agreement, and, on having a good and marketable title shown to the said estate and premises, and a conveyance of the fee-simple thereof, discharged of all incumbrances, made to him, to pay the residue of said purchase-money or sum of \$—— to the said defendant? and

10. Whether the said defendant doth not, and why, refuse to perform his part of the said agreement? and

11. Whether the said defendant is not able to make a good and marketable title to the said estate and premises; and if not, why not? and

12. Whether he doth not, and why, decline or refuse to make a good and marketable title to the said premises? and

13. Whether the plaintiff hath not required him so to do, and made such offer to him as in that behalf aforesaid, or to that or the like or some and what other purport or effect? and

14. Whether the whole of the residue of the purchase-money of the said premises hath not been ready and unproductive in the hands of the plaintiff, for the purpose of completing said purchase, from the time the same ought to have been completed by the terms of said agreement, or from some and what other time?

# PART II.

## FORMS OF THE VARIOUS MODES OF DEFENCE TO SUITS IN EQUITY.

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### CHAPTER VII.

#### DEMURRERS.

##### 1. *Title and commencement.*

THE demurrer of C. D., defendant, to the bill of complaint of A. B., the above-named plaintiff.<sup>1</sup>

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer sheweth that, &c.  
[*Here set forth the cause of demurrer.*]

##### 2. *Conclusion.*

Wherefore and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto, and humbly demands the judgment of this Court whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed, with his costs and charges in this behalf most wrongfully sustained.

A. B.,  
[*Counsel's name.*]

<sup>1</sup> *Other headings.*—The demurrer of John Jones (in the bill by mistake called William Jones), the above-named defendant [*or*, one of the above-named defendants], to the, &c.

*Or,*

The joint and several demurrer of A. B. and C. D., the [*or*, two of the] above-named defendants, to the, &c.

*Or,*

The joint demurrer of A. B. and C. his wife, the [*or*, two of the] above-named defendants, to the, &c. *Or, if they have married since she was made a defendant, say:* The joint demurrer of A. B. and C. his wife, lately, and in the bill called C. D., spinster,—*or*, widow,—to the, &c.

\* 3. *Demurrer for want of Equity.*

\* 2086

[*Title and commencement as before.*]

*Cause of demurrer.*] That the plaintiff hath not in and by his said bill made or stated such a case as entitles him, in a Court of Equity, to any discovery from this defendant [*or, these defendants or either of them*] or to any relief against him [*or, them or either of them*] as to the matters contained in the said bill or any of such matters. Wherefore,<sup>1</sup> &c.

*Or thus.*] That the said bill doth not contain any matter of Equity whereon this Court can ground any decree, or give to the plaintiff any relief against this defendant [*or, these defendants, or either (any) of them*].<sup>2</sup>

4. *Form of Demurrer prescribed in Chancery Rules of New Hampshire.*

In the Supreme Judicial Court.

H—, ss.

T. P. v. T. D. &amp; another.

The demurrer of T. D.

The said T. D. says that the plaintiff is not entitled upon said bill to the relief he prays for, because he had a plain and adequate remedy at Law, and because, &c.

T. D., by

A. T., *his Solicitor.*5. *Demurrer for multifariousness.*

The demurrer of, &amp;c.

This defendant, by protestation, &c., doth demur, and for cause of demurrer sheweth, that it appears by the said bill that the same is exhibited against the defendant and the several other persons therein named as defendants thereto for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested, or concerned, and that the said bill is altogether multifarious. Wherefore,<sup>3</sup> &c.

\* 6. *Demurrer on the ground of the Statute of Frauds.* \* 2087

That it appears by the said bill that neither the promise or contract which is alleged by the said bill, and of which the plaintiff by the said bill seeks to have the benefit, nor any memorandum or note thereof,

<sup>1</sup> Leave to correct a clerical error in demurrer granted, time for demurring not having expired. *Richardson v. Hastings*, 7 Beav. 58. Demurrer must state some cause arising out of the bill, but must not introduce a material fact. See *Wood v. Midgley*, 5 De G. M. & G. 41; 23 L. J. Ch. 553.

<sup>2</sup> *Barkworth v. Young*, 4 Drew. 1; *Drewry*, Eq. Pl. 145.

<sup>3</sup> See *Rump v. Greenhill*, 1 Jur. N. S. 123, R : 20 Beav. 512; *Pietou v. Lockett*, by the Vice-Chancellor of England, April. 1837, MSS.

was ever reduced into writing or signed by this defendant [*or*, these defendants or either (any) of them], or any person authorized thereunto, within the meaning of the statute passed in the twenty-ninth year of King Charles the Second [*or*, of Chapter 105 of the General Statutes of Massachusetts] for the prevention of frauds and perjuries.

### 7. *Demurrer and answer.*<sup>1</sup>

The joint and several demurrer of W. L. and J. L. to *part*,<sup>2</sup> and the joint and several answer of the same defendants to the *residue*, of the original bill of complaint of T. A. P. and J. B., plaintiffs.

These defendants, to so much of the plaintiffs' bill as prays that they may be decreed to transfer to the said plaintiffs, as the executors of G. M. in the said bill mentioned, the 21-64th shares of the ship called, &c., in the said bill mentioned, and that the said defendant J. L. may be decreed to transfer to the plaintiffs the 21-64th shares of the brig or vessel called, &c., in the said bill mentioned, and to so much of the said bill as prays that an account may be decreed to be taken of all the dealings and transactions between these defendants and the said G. M. with respect or in relation to the said two vessels, and of all sums of money respectively received and paid by these defendants and the said G. M. respectively, or by any other person by their or any of their respective order, or for their or any of their use, and that these defendants should be decreed to pay what should be found due thereon, so far as such dealings and transactions and sums of money, or any or either of them, relate to or concern the said 21-64th shares of the said vessel called, &c. or the said 21-64th shares of the said vessel called, &c., and the freights or freight, or any shares or share of the freights or freight, of such vessels or either of them, and to so much of the said bill as prays further or other relief with respect or in relation to the said shares of the said two vessels respectively or the freight thereof respectively.

*Cause of demurrer.*] These defendants do demur and for cause of demurrer show, that the said plaintiffs have not made or stated such a case as entitles them in a Court of Equity to the relief so prayed for, or any part thereof; and these defendants humbly pray the \* 2088 judgment \* of the Court as to such parts of the bill as they have so demurred to as aforesaid.

*Answer to residue of bill.*] And as to the residue of the said bill, that is to say, all the discovery, and the rest of the relief, by the said bill prayed, these defendants for answer thereto severally say, they admit it to be true that Messrs. C. & N. were, in the month of, &c., engaged in building at Liverpool, on their own account, a certain brig or vessel, and that in the month of, &c., these defendants W. L. and J. L. did

<sup>1</sup> For form of plea and demurrer, see Carter v. Treadwell, 3 Story, C. C. 42, 43, 44.

<sup>2</sup> It is submitted that this is the correct form, notwithstanding what is said in the report of

Osborne v. Jullion, 3 Drew. 552; 4 W. R. 663; and see, as to form of plea and demurrer, Barnes v. Taylor, 4 W. R. 577.

carry on business together in partnership as wine merchants and general dealers,<sup>1</sup> &c., &c.

*8. General form of demurrer, plea, and answer.*

In Chancery.

Between, &c.

The demurrer, plea, and answer of A. B., the above-named defendant [or, one of the above-named defendants], to the bill of complaint [or, amended bill of complaint] of the above-named plaintiff.

(1) *Demurrer.*] I, the defendant A. B., by protestation, not confessing or acknowledging all or any of the matters and things in the said bill contained to be true, in such manner and form as the same are therein set forth and alleged, as to so much of the said bill as seeks (state what), and also as to so much of the said bill as seeks, &c., do demur thereto.

And as to the discovery and relief sought by the said bill, save so much thereof as relates to the premises therein mentioned to be situate at S., in the county of D., for cause of demurrer I show that, &c.

And as to so much of the said discovery and relief as relates to the said premises at S. aforesaid, for cause of demurrer I show that, &c.

Wherefore and for divers other good causes of demurrer appearing in the said bill, I pray the judgment of this honorable Court whether I shall be compelled to make any answer to such parts of the said bill as I have hereinbefore demurred to.

(2) *Plea.*] And I, the defendant A. B., not waiving my said several demurrers, but wholly relying thereon, as to so much of the said bill as seeks, &c., and also as to so much of the said bill as seeks, &c., do plead thereto; and for plea say that, &c.; and I do aver that, &c.

All which last-mentioned matters and things I do plead in bar to so much of the said bill as is hereinbefore pleaded to; and I humbly \* pray judgment of this honorable Court, whether I ought to \* 2089 make any further answer to so much of the said bill as is hereinbefore pleaded to.

(3) *Answer.*] And I, the defendant A. B., not waiving my said several demurrers and plea, but wholly relying and insisting thereon, for answer to so much of the said bill as I am advised it is material or necessary for me to make answer unto, say as follows, &c.

[*Name of Counsel.*]

<sup>1</sup> In this case, the demurrer extended too far, in demurring to the relief sought in respect of the freight of the vessels, as well as the transfer of them, and it was held that, consistently with the law as to the registration of vessels, one person might be the legal owner of

a ship, while another person was entitled in Equity to the freight. *Pictou v. Lockett*, V. C. E., April, 1837, MSS.; see also *Davenport v. Whitmore*, 2 Myl. & Cr. 177; *Armstrong v. Armstrong*, 21 Beav. 78. As to form of demurrer and answer, see *ante*, Vol. I. pp. 585, 711.

9. *Demurrer for want of parties.*[*Title and commencement.*]

And for [further] cause of demurrer show, that there are not proper parties to the said information, and that there is not and are not any person or persons, party or parties,<sup>1</sup> to the said information who represents or represent, or has or have a common interest with the persons or class of persons whose interests the said information affects to protect, or for whom relief is thereby prayed.<sup>2</sup> Wherefore, &c.

10. *Another form of demurrer for want of parties.*

The demurrer of, &c.

These defendants by protestation, &c., do demur to the said bill, and for cause of demurrer show that it appears by the said plaintiff's said bill that a personal representative of R. S., the testator therein named, resident within the jurisdiction of the Court, is a necessary party to the said bill, and yet that there is no personal representative of the said testator resident within the jurisdiction of the Court a party to the said bill. Wherefore, &c.

*Or thus.*] That it appears by the said bill that it is necessary that the estate of the plaintiff's late wife, M. N., in the said bill named, should be represented in this suit; but no legal personal representative of the said M. N. is named a party thereto.

11. *Demurrer to a bill exhibited by an infant, where no next friend is named.*[*Title and commencement.*]

That the said plaintiff, who appears by his said bill to be an infant under the age of twenty-one years, has exhibited his said bill without any person being therein named as his next friend. Wherefore, &c. [*Conclusion.*]

\* 2090 \* 12. *Demurrer to a bill where a plaintiff claimed under a will, and it was apparent on the face of the bill that he had no title.*[*Title and commencement.*]

That the said plaintiff has not, as appears by his said bill, made out any title to the relief thereby prayed. Wherefore, &c. [*Conclusion.*]

<sup>1</sup> If the absent parties are necessary for any part of the relief prayed by the bill, it is an objection on demurrer. Per Lord Cottenham L. C., *Penny v. Watts*, 2 Phil. 152.

<sup>2</sup> See *Att.-Gen. v. Poole*, 2 Keen, 190; S. C. on appeal, 4 Myl. & Cr. 17; *Hammond v. Messenger*, 9 Sim. 238.

13. *Demurrer to a bill of interpleader, for want of the necessary affidavit, and for want of Equity.*

The demurrer of, &c.

This defendant by protestation, &c., doth demur in Law to the said bill, and for cause of demurrer sheweth that, although the said plaintiff's said bill is upon the face thereof a bill of interpleader, yet the said plaintiff has not annexed to his said bill an affidavit that he doth not collude concerning such matters with any of the defendants thereto, which affidavit ought, according to the rules of this Court, as this defendant is advised, to have been made by the said plaintiff and annexed to the said bill; and for further cause of demurrer this defendant further sheweth that the said bill does not contain sufficient matter of Equity whereupon this Court can ground any decree in favor of the said plaintiff, or give the said plaintiff any relief against this defendant. Wherefore, &c.

14. *Demurrer to a bill of interpleader, because it does not show any claim of right in the defendant.*

The demurrer of, &c.

This defendant, by protestation, &c., doth demur, and for cause of demurrer sheweth, that the plaintiff has not in his said bill of interpleader shown any claim or right, title, or interest whatsoever in this defendant in or to the said estate called A., in the said bill particularly mentioned and described, in respect whereof this defendant ought to be compelled to interplead with C. D., in the said bill named, and the other defendant thereto. Wherefore, &c.

15. *Demurrer to a bill for relief on a lost bond, for want of an affidavit of such loss being annexed to and filed with the bill.*

[*Title and commencement.*]

That the said plaintiff by his said bill, as this defendant is advised, endeavors to entitle himself to a sum of money due upon the bond therein stated to have been entered into by this defendant to the said plaintiff, and suggests for Equity, that the said bond has been burnt, lost, or destroyed; and the said plaintiff has not by affidavit, annexed \*to and filed with the said bill, made oath that the said bond is \*2091 burnt, lost, or destroyed. Wherefore, &c. [*Conclusion.*]

16. *Demurrer to a bill for relief against a mandamus.*

[*Title and commencement.*]

As to so much and such part of the said plaintiff's bill as prays an injunction, or order in the nature of an injunction, to stay proceedings on the writ of mandamus, issued to compel the said plaintiff to hold a Court, and admit these defendants respectively as tenants thereto, these defendants severally demur, and for cause of demurrer show that it is

against the course and practice, and not within the jurisdiction of this Court, to interfere or afford relief against the said writ of mandamus, or any other proceeding of a criminal or mandatory nature. Wherefore, &c. [*Conclusion.*]

17. *Demurrer to a bill to restrain a private nuisance, the plaintiff not having established his right at Law.*

[*Title and commencement.*]

That the plaintiff has not, by his said bill, shown such a case as entitles him to such relief as is thereby prayed, inasmuch as it does not thereby appear that there was any impediment to an action at Law being brought by the said plaintiff to ascertain his right and that of this defendant, relative to the wall in the said bill particularly mentioned, or that in any trial or action verdict or judgment has been hitherto obtained by the said plaintiff for that purpose, or that there was previously to or at the time the said bill was filed, or now is, any authentic record of such right. Wherefore, &c. [*Conclusion.*]

18. *Demurrer, for want of privity, to a bill by an unsatisfied legatee against a debtor of his testator.*

[*Title and commencement.*]

That it appears by the said plaintiff's said bill, that there is no privity between the said plaintiff and this defendant, to enable the said plaintiff to call on this defendant for payment of any debt due to the estate of the said testator from this defendant. Wherefore, &c. [*Conclusion.*]

19. *Demurrer by an arbitrator made party to a bill to impeach his award.*

[*Title and commencement.*]

For that the said plaintiff has not, by his said bill, which seeks to set aside the award therein set forth, and to which this defendant is \* 2092 made \* a party in his character of an arbitrator, shown that he can have any decree against this defendant, whose answer could not be read as evidence against the other defendants to the said bill, or any of them; and the said plaintiff, for anything that appears in the said bill to the contrary, might examine this defendant as a witness in the suit. Wherefore, &c. [*Conclusion.*]

20. *Demurrer to a bill brought against a defendant by a judgment creditor who had not sued out execution, for a discovery of goods of the debtor, alleged to have been fraudulently possessed by the defendant.*

[*Title and commencement.*]

That the said plaintiff has not alleged, nor does it appear by his said bill that he has sued out execution, and actually taken out a *fieri facias*



on his said judgment, and that until he has so done the goods of A. B. in the said bill named are not bound by the said judgment, nor the said plaintiff entitled to a discovery thereof. Wherefore, &c. [*Conclusion.*]

21. *Demurrer where a discovery would subject the defendant to pains and penalties and forfeitures.*

[*Title and commencement.*]

That the said information seeks to discover how this defendant came by the possession of the several goods therein particularly mentioned, whether it was not by fraud, violence, contrivance, or other means, &c., &c., but this defendant is advised, that any discovery of the manner in which such goods came into this defendant's possession, as an officer of the honorable united company of merchants trading to the East Indies, would or might subject this defendant to fine, or corporal punishment, and the penalties contained in the several acts of Parliament for the establishment of the said company, and also to a forfeiture of his rank and office in the service of the said company, and likewise of the said goods. Wherefore, &c. [*Conclusion.*]

22. *Demurrer to a bill of review and supplemental bill on the ground that there are no errors in the decree, and that the leave of the Court was not first obtained.*

These defendants by protestation, &c., do demur in Law thereto, and for cause of demurrer show, that there are no errors in the record and premises, and in the decree of the — day of —, in the said bill of review and supplemental bill mentioned, nor is there any sufficient matter alleged in the said bill of review and supplemental bill, to entitle \*the said plaintiff to reverse the said decree; and for \*2093 divers other defects and errors appearing in the said bill of review and supplemental bill, these defendants do demur in Law thereto; and these defendants, for further cause of demurrer, humbly show, that, under the rules of this honorable Court, no supplemental or new bill in the nature of a bill of review, grounded upon any new matter discovered or pretended to be discovered since the pronouncing of any decree of this Court, in order to the reversing or varying of such decree, shall be exhibited without the special leave of the Court first obtained for that purpose; wherefore, and for that the said plaintiff does not allege by the said bill of review and supplemental or new bill that he had first obtained leave of this Court for exhibiting the said bill of review and supplemental or new bill, these defendants demur in Law thereto, and humbly pray the judgment of the Court, whether they ought to be compelled to put in any further or other answer to the said plaintiff's said bill of review and supplemental or new bill, and humbly pray to be hence dismissed with their reasonable costs in this behalf, most wrongfully sustained.<sup>1</sup>

<sup>1</sup> *Ante*, Vol. II. pp. 1577, 1578.

## PLEAS.

1. *Title and commencement of plea.*<sup>1</sup>

THE plea of —, defendant [*or of —, defendants*], to the bill of complaint [*or, amended bill of complaint*], of —, plaintiffs [*or the joint and several plea of A. B. and C. D., defendants, &c.*].<sup>2</sup>

This defendant [*or these defendants*], by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth and alleged, for plea to the whole of the said bill, or to so much and such part of the said bill as prays, &c., or seeks a discovery from this defendant [*or these defendants*], whether, &c., saith [*or say*] that, &c.

2. *Conclusion.*

All which matters and things this defendant doth aver [*or these defendants do aver*] to be true, and he pleads [*or they plead*] the said [*statute or release, &c., as the case may be (in bar)*] to the said plaintiff's bill [*or if the plea extend to part only, to so much of the said bill as hereinbefore particularly mentioned*], and prays [*or pray*] the judgment of this honorable Court, whether he [*or they*] should be compelled [*or ought to be required*] to make any other or further answer to the said bill [*or to so much of the said bill as is hereinbefore pleaded to*], and prays [*or pray*] to be hence dismissed with his [*or their*] costs and charge in that behalf, most wrongfully sustained.

[*Counsel's signature.*]

3. *Plea to part, and answer to residue of bill.*<sup>3</sup>

The plea of —, defendant [*or one of the defendants*], to part, and the answer of the same defendant to the residue, of the bill of

<sup>1</sup> See *ante*, Vol. I. p. 681.

<sup>2</sup> *Other headings.* — The joint and several plea of A. B. and C. D., the [*or, two of the*] above-named defendants, to the, &c.

*Or,*

The joint plea of A. B. and C. his wife, the [*or, two of the*] above-named defendants, to

the, &c. — *Or, if they have married since she was made a defendant say:* The joint plea of A. B. and C. his wife, lately, and in the bill called, — C. D., spinster, — *or, widow, — to the* &c.

<sup>3</sup> For form of plea to part and demurrer to the residue of a bill in which plaintiff alleged himself to sue as administrator of a deceased per-

\* complaint of —, plaintiff [*or the joint plea and answer, or the* \* 2095  
joint and several plea and answer, *according to circumstances*].

This defendant, to all the relief sought by the said bill, and also to all the discovery thereby sought, except the discovery sought by or in respect of [so much of the said bill as prays that this defendant may answer and set forth] whether, &c. [*here the language of the interrogatories which it is necessary to answer, must be introduced*], this defendant does plead in bar, and for plea saith, &c. [*here follows the plea*].

All which matters and things this defendant does aver to be true, and does plead the same in bar to the whole of the said bill, except such part of the discovery thereby sought as aforesaid; and this defendant humbly prays the judgment of this honorable Court, whether he ought to be compelled to make any further or other answer to so much of the said bill as is hereby pleaded to, and he prays to be hence dismissed with his costs.

*And for answer* to such parts of the said bill as are excepted, this defendant says, that, &c.<sup>1</sup> [*here the answer follows*].

[*Counsel's signature.*]

## I. PLEAS TO THE PERSON.

### 4. *Plea that the plaintiff is an alien enemy.*

[*Title and commencement as before.*]

That the said plaintiff A. B. is an alien, born of foreign parents, and in foreign parts, that is to say, at Calais, in the Kingdom of France, and out of the allegiance of *our said lord* the King, and under the allegiance of the said King of France, who is an enemy to *our said lord* the King, and to whom the parents of the said plaintiff adhere;

\* and the said plaintiff before and at the time of filing his said \* 2096

son, and also in his own private capacity, the plea denying that he was administrator, and the demurrer being that the bill showed no right to discovery or relief in his private capacity, see *Carter v. Treadwell*, 3 Story, 42, 43, 44.

<sup>1</sup> See *Miffl. Pl.* pp. 257, 329; *ante*, Vol. I. p. 693.

If the bill is demurrable, the defendant should demur and not plead. *Billing v. Flight*, 1 Mad. 230.

*As to plea of stated account and release.* — If error or fraud is charged by the bill, it must be denied by the plea as well as answered in support of the plea. See, as to form of the plea, *Phelps v. Sproule*, 1 M. & K. 231; *Holland v. Sproule*, 6 Sim. 623; *Parker v. Alcock*, 1 Y. & J. 432; *Att.-Gen. v. Brookshank*, 1 Y. & J. 439.

*As to plea of adverse possession*, see *Hardman v. Ellames*, 5 Sim. 640; 2 Myl. & K. 732.

*As to plea stating descent to heir-at-law*, see *Wood v. Skelton*, 6 Sim. 176.

The Statute of Frauds is generally taken advantage of by demurrer or answer. See *Walker v. Locke*, 5 Cush. 90, 93.

*As to plea of the Statute of Limitations*, in case of a bill for an account, see *Forbes v. Skelton*, 8 Sim. 335; *Inghis v. Haigh*, 8 Mees. & W. 769; *Cottam v. Partridge*, 4 Scott. N. R. 819. In case of a bill of foreclosure and plea of 3 & 4 Will. 4, c. 27, § 40, see *Dearman v. Wyche*, 9 Sim. 573, and for form of plea and answer, *id.* 579.

*As to plea of purchase for valuable consideration*, see *Pennington v. Beechey*, 2 Sim. & St. 282; *Jackson v. Rowe*, 5 Russ. 514; S. C. 2 Sim. & St. 472; *Lord Portarlington v. Soulby*, 6 Sim. 356.

*As to plea being supported by an answer*, see *ante*, Vol. I. p. 614; *Sanders v. King*, 6 Mad. 61; *Emerson v. Harland*, 3 Sim. 490; 2 Cl. & Fin. 10; *Foley v. Hill*, 3 Myl. & Cr. 475; *Denys v. Loeck*, *id.* 205.

*As to pleading double*, see *Kay v. Marshall*, 1 Keen, 190.

bill was, and now is, an enemy to our said lord the King, and entered into these dominions without the safe-conduct of our said lord the King, and has not been made a subject of our said lord the King by naturalization, denization, or otherwise. Therefore, &c. [*Conclude as above.*]

5. *Plea of infancy to a bill exhibited without a prochein ami.*

[*Title and commencement as before.*]

That the said plaintiff, before and at the time of filing his said bill in which he appears as the sole plaintiff, was, and now is, an infant under the age of twenty-one years; that is to say, of the age of — or thereabouts. Therefore, &c. [*Conclude as above.*]

6. *Plea of coverture of the plaintiff.*

[*Title and commencement as before.*]

That the said plaintiff A. B., before and at the time of exhibiting her said bill, was, and now is, under coverture of one C. D., her husband, who is still living, and in every respect capable, if necessary, of instituting any suit at Law or in Equity in this —, on her behalf. Therefore, &c. [*Conclude as before.*]

7. *Plea of lunacy.*

[*Title and commencement as before.*]

That the said plaintiff, who by himself alone attempts to sustain an injunction in this suit, before and at the time of filing his said bill, was duly found and declared to be a lunatic, under and by virtue of a commission of lunacy, duly awarded and issued against him, as by the inquisition thereon (a true copy whereof is now in this defendant's possession, and ready to be produced to this honorable Court), to which this defendant craves leave to refer, will more fully appear; and which said commission has not hitherto been superseded, and still remains in full force and effect; and the said A. B. therein named, and the said plaintiff is, as this defendant avers, one and the same person, and are not other and different persons. Therefore, &c. [*Conclude as above.*]

\* 2097 \* II. THAT THE PLAINTIFF IS NOT THE PERSON HE PRETENDS TO BE, OR DOES NOT SUSTAIN THE CHARACTER HE ASSUMES.<sup>1</sup>

8. *Plea that the supposed intestate is living, to a bill where the plaintiff entitled himself as administrator.*

[*Title and commencement as before.*]

That the said A. S., in the said bill named (to whom the said plaintiff alleges that he has obtained letters of administration, and by virtue of

<sup>1</sup> See *Carter v. Treadwell*, 3 Story, 42, 43.

which letters of administration, and also under the pretence of his being the heir-at-law of the said A. S., the said plaintiff has commenced and prosecuted this suit), was at the time the said plaintiff filed his said bill, and still is, alive at Paris, in the Kingdom of France. Therefore this defendant demands the judgment of this honorable Court, whether he shall be compelled to answer the plaintiff's bill; and humbly prays to be dismissed with his reasonable costs on this behalf sustained.

9. *Plea that plaintiff is not administrator, as he alleges himself to be, of a person deceased.*

[*Title, &c., as before.*]

These defendants, by protestation, &c., to the matter in said bill contained, and to so much thereof as sets forth that said E. C. is the administrator of the estate of said S. R. A., and to so much thereof as relates to any contract of purchase between said S. R. A. and these defendants, and seeks to have such contract rescinded, and prays for relief in the premises, and that these defendants may be required to refund to said E. C. all the money paid by S. R. A. upon the said purchase, and that the notes given in payment therefor may be given up to be cancelled, and that the plaintiff may be repaid all damages and expenses which said S. R. A. may have suffered by reason of the premises, do thereunto plead, and for plea say, that said E. C. is not administrator as in the bill mentioned, or the legal representative of said S. R. A., duly appointed and qualified to act as therein set forth. All which matters and things these defendants aver to be true, and plead the same to so much of said bill as aforesaid, and pray judgment of this honorable Court, whether they ought to be required to make any other or further answer thereunto.

\* III. THAT THE DEFENDANT HAS NOT AN INTEREST IN THE \* 2098  
SUBJECT THAT CAN MAKE HIM LIABLE TO DEMANDS  
OF THE PLAINTIFF.

10. *Plea that the defendant has no interest in the subject of the suit.*

[*Title and commencement as above.*]

As to so much of and such parts of the plaintiff's bill as charges that this defendant is interested in the personal estate of A. B., the testator in the said bill named, and seeks an account of the said testator's personal estate; this defendant pleads thereto, and for plea saith, that he is merely a subscribing witness to said testator's will, and in no wise interested therein; and this defendant avers that he has not, nor ever had, or pretended to have, nor does he nor did he ever claim any right, title, or interest whatsoever in the personal estate of the said testator, or any part thereof, and that the said plaintiff has no right to institute this, or any other suit against him in respect thereof. All which said matters and things this defendant doth aver and plead in bar to so much

of the said plaintiff's bill as hereinbefore particularly mentioned and pleaded to. And this defendant, not waiving his said plea, but relying thereon, and for better supporting the same, for answer to so much of the said bill as aforesaid, saith he denies that he now is, or ever was, interested in the personal estate of the said testator or any part thereof.

IV. THAT THE DEFENDANT IS NOT THE PERSON HE IS ALLEGED TO BE, OR DOES NOT SUSTAIN THE CHARACTER HE IS ALLEGED TO HAVE.

11. *Plea that the defendant never was administrator.*

[*Title and commencement as above.*]

That he is not, nor ever has been, administrator of the goods or estate which were of the said E. F., deceased, in the said bill named, as the said plaintiff in his said bill has untruly alleged. Therefore, &c.  
[*Conclude as above.*]

12. *Plea to a bill of revivor against the administrators of the original defendant, deceased, that the defendant never was appointed executor or administrator of the deceased in the State where the suit is sought to be revived against him as such.*

[*Title and commencement as before.*]

That the said W. D. M. H. [*the original defendant*], at the time of his decease, was a citizen of and resident in the State of C., and that \* 2099 \* his last will and testament was duly proved and allowed in the county of S. F., in the said State of C.; and that this defendant was named as one of the executors thereof, and duly appointed as such by the said Court of Probate, and that this defendant has not been appointed an executor of the said will, or an administrator upon the estate of the said W. D. M. H., by any Court of Probate or other Court in the State of M.; that at the time when service of the plaintiff's bill was made upon him, he was, and has since continued to be, a citizen of the said State of C.; that he was then casually within said State of M., and for a temporary purpose only, and at that time had no assets of the estate of the said W. D. M. H. in his possession or under his control. All which matters and things this defendant doth aver to be true, and pleads the same to the said bill of revivor, and demands the judgment of this honorable Court whether he ought to be compelled to make any answer thereto, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

H. F. T.

[*Jurat.*]

[Held a good plea in *Mellus v. Thompson et al.*, U. States C. Court, for Mass., 1857.]<sup>1</sup>

<sup>1</sup> See *Beaman v. Elliot*, 10 Cush. 172.

## PLEAS IN BAR.

V. THAT FOR SOME REASON, FOUNDED ON THE SUBSTANCE OF THE CASE,  
THE PLAINTIFF IS NOT ENTITLED TO RELIEF.

13. *Plea of a decree, as of record in a Court of Equity.*

[*Title and commencement as above.*]

As to so much and such part of the said plaintiff's bill as seeks to compel this defendant either to admit assets of his late father I. M., deceased, come to his hands, sufficient to answer and satisfy the said plaintiff's demand in the said bill mentioned, or to set forth a full and perfect inventory and account of all the personal estate of his this defendant's said father, come to the hands of this defendant, or to the hands of any other person or persons for his use, with the nature, kind, and value thereof, and of every part thereof, and of all sums of money come to the hands of this defendant, or any other person or persons for his use, for or on account of the real estates of this defendant's said father, or the rents or profits thereof (charged with the several legacies in the said testator's will, and in the said bill also mentioned \* to \*2100 be given and bequeathed to and for the younger children of the said testator in the said will, and in the said bill also respectively named); and also to set forth the annual value of such real estates; or that this defendant may thereout pay to the said plaintiff the sum of \$ —, in the said plaintiff's bill mentioned, with interest for the same, from the time of the said testator's death; this defendant doth plead thereto, and for plea saith, that at the term of — in the year —, M. M., since deceased, together with P. M., deceased, and late the wife of the said plaintiff, and S. M. and H. M. respectively, infants, by the said M. M., their sister and next friend (and which said M. M., P. M., the said plaintiff's late wife, S. M., and H. M. were the daughters and younger son of the testator I. M., all since deceased), exhibited their bill of complaint in this honorable Court, against E. P. and R. T., Esqs. (both since deceased), and this defendant, as eldest son and heir-at-law of the said testator I. M. thereby stating, &c., &c., and praying that the legacies given and bequeathed by the said testator in and by his said will, to the said plaintiff M. M., as one of the younger children, might be paid, and the legacies or shares of the rest of such younger children, all of whom were infants, might be properly secured for their benefit, and a suitable allowance made thereout for their maintenance and education during their respective minorities, to which said bill this defendant, who was then an infant, put in his answer by A. B., his guardian, and the said other defendants respectively also put in their answers thereto, and submitted to this honorable Court what right and interest the said plaintiff M. M. was entitled to under her said father's will, and the said cause afterwards and on or about the — day of — came on to be heard, and a decree was then pronounced therein whereby it was referred to C. D., Esq., then one of the Masters

of this honorable Court, to take an account of certain stock, which the said testator by his said will had given and bequeathed among and to his children, and the usual accounts of personal estate, funeral and testamentary expenses, and debts of the said testator, and an account of the rents and profits of the said testator's real estates were thereby directed, and which said decree was afterwards, and on or about —, duly signed and enrolled; and the said Master afterwards, in pursuance of the said decree, took the said accounts, and by his report, bearing date the — day of —, which was afterwards confirmed, stated, &c. [*all that was done by the Master*], and the said share so reported due to the said P. M., since deceased, was afterwards, in pursuance of an order of this honorable Court, since her marriage with the said plaintiff in the present suit, on or about — day of —, duly assigned and transferred to, and accepted by him, in full satisfaction and discharge of all the right and interest which his said wife, or the said plaintiff

in this suit in her right, or either of them, had, or could have,  
 \* 2101 in or to the personal \* estate of the said testator, or any part thereof; all of which matters and things this defendant doth aver and plead in bar to so much of the said plaintiff's bill as hereinbefore particularly mentioned; and prays judgment of this honorable Court whether he should make any further answer to so much of the said bill as is hereinbefore pleaded to.

#### 14. *Plea of former suit depending.*<sup>1</sup>

[*Title and commencement as above.*]

That at a term of the — Court —, which was held in the year —, the said present plaintiff exhibited his bill of complaint in this honorable Court against this defendant and one L. Y. for an account of the moneys raised by the sale of the plantations and other estates in the said plaintiff's present bill mentioned, and claiming such shares and proportions thereof, and such rights and interests therein, as he now claims by his present bill; and praying relief against this defendant in the same manner, and for the same matters, and to the same effect as the said plaintiff now prays by his said present bill; and this defendant and the said L. Y. appeared and put in their answer to the said former bill, and the said plaintiff replied thereto, and witnesses were examined on both sides, and their depositions duly published, and the said former bill and the several proceedings in the said former cause, as this defendant avers, now remain depending, and as of record in this honorable Court, the said cause being yet undetermined and undismissed; all which several matters and things this defendant doth aver, and

<sup>1</sup> See *Jenkins v. Eldredge*, 3 Story, 181. If a former judgment of a court of general jurisdiction is pleaded in bar, the plea is not bad if it does not aver service of process upon or appearance by the defendant, as the presumption is that the court had jurisdiction of the subject-matter and of the parties. *Lynde v. Columbus &c. Ry. Co.* 57 Fed. Rep. 993.

An estoppel *in pais*, although it need not be pleaded in an action at Law, must yet be pleaded in Equity when it is the basis of a right to relief or of defence. *Dean v. Crall* (Mich.), 38 Cent. L. J. 450.



pleads the said former bill, answer, and the several proceedings in the said former suit in bar to the said plaintiff's present bill; and humbly demands the judgment of this honorable Court, whether he shall be put to make any further or other answer thereto; and prays to be hence dismissed with his costs and charges in this behalf sustained.

## VI. PLEAS IN BAR, OF MATTER IN PAIS.

### 15. *Plea of stated account.*

[*Title and commencement as above.*]

As to so much and such parts of the said plaintiff's bill as seeks an account of and concerning the dealings and transactions therein alleged to have taken place between the said plaintiff and this defendant, at \* any time before the — day of —, in the year —, \* 2102 this defendant for plea thereto saith, that on the — day of —, which was previously to the said bill of complaint being filed, the said plaintiff and this defendant did make up, state, and settle an account in *writing*, a counterpart whereof was then delivered to the said plaintiff, of all sums of money which this defendant had before that time, by the order and direction, and for the use of the said plaintiff received, and of all matters and things thereunto relating, or at any time before the said — day of —, being or depending between the said plaintiff and this defendant (and in respect whereof the said plaintiff's bill of complaint has been since filed), and the said plaintiff, after a strict examination of the said account, and every item and particular thereof, which this defendant avers according to his best knowledge and belief to be true and just, did approve and allow the same, and actually received from this defendant the sum of \$ —. the balance of the said account, which by the said account appeared to be justly due to him from this defendant; and the said plaintiff thereupon, and on the — day of —, gave to this defendant a receipt, or acquittance for the same, under his hand, in full of all demands, and which said receipt or acquittance is in the words and figures following (that is to say), [*here state the receipt verbatim*], as by the said receipt or acquittance, now in the possession of this defendant, and ready to be produced to this honorable Court, will appear. Therefore, &c. [*Conclude as above.*]

### 16. *Conclusion of plea of release.*

Therefore this defendant pleads the said release in bar to so much of the said plaintiff's bill as is hereinbefore particularly mentioned, and humbly prays the judgment of this honorable Court, whether he ought to be compelled to make any further answer to so much of the said bill as is before pleaded unto; and this defendant, not waiving the said plea, but insisting thereon for answer to the residue of the said bill, and in support of his said plea saith, he denies that the said release was unduly obtained by this defendant from the said plaintiff, or that the said plaintiff was ignorant of the nature and effect of such release,

or that the consideration paid by this defendant to induce the said plaintiff to execute the same, was at all inadequate to the just claims and demands of the said plaintiff against this defendant, in respect of the several dealings and transactions in the said bill mentioned, or any of them; and this defendant denies, &c.

\* 2103

\* 17. *Plea of a will.*[*Title and commencement as above.*]

As to so much and such part of the plaintiff's bill as seeks [*that a Receiver may be forthwith appointed to Receive the rents and profits of the real estates, late of John Thompson, deceased, in the said bill named, and now in the possession of this defendant*], and that this defendant may account with the said plaintiff for the rents and profits thereof, and that this defendant may be restrained by the order and injunction of this honorable Court from felling, &c., timber, &c., growing thereon, or which seeks to set aside the will of the said John Thompson, or which seeks any relief relative thereto, this defendant doth plead thereto, and for plea saith, that the said John Thompson being before, and at the time of making his will, seised to him and his heirs, of and in divers parcels of real estate, in the several counties of —, of the yearly value of \$ —, or thereabouts, and being of sound mind, memory, and understanding, duly made and published his last will and testament in writing, bearing date the — day of —, which was duly executed and attested, and thereby gave, &c. [*setting forth the will, under which the defendant had an estate for life in the testator's real estate, with remainder, &c., and that the testator appointed the defendant executor of his said will*], and the said John Thompson being so seised or entitled as aforesaid died on the — day of —, without having altered or revoked his said will; and this defendant, soon after the death of the said testator, entered on the said real estates devised to him in manner aforesaid, and has ever since been in the enjoyment or receipt of the rents and profits thereof. Therefore, &c. [*Conclude as above.*]

18. *Circumstances bringing a case within the protection of a statute; viz., the Statute of Limitations or the Statute of Frauds.*<sup>1</sup>

[*Title and commencement as above.*]

As to so much of the bill as seeks an account and discovery of the estate and effects of H. C., Esq., deceased, this defendant's testator, or that seeks a satisfaction for, or in respect of, any money received by the said H. C., for or on account of I. G., in the said bill named, or for or on account of the said plaintiff; or that seeks a discovery of how many hogsheads of tobacco or rice, or any other commodities pre-

<sup>1</sup> If the want of a writing, where one is required by statute, appears on the face of a bill, the objection may be taken by demurrer.

Walker v. Locke, 5 Cush. 90; Slack v. Black, 109 Mass. 496.

tended to have been consigned to the said H. C., or that seeks a satisfaction for the same; or that seeks a discovery or satisfaction for any of the money, goods, or effects of the said I. G., come to the hands of this \*defendant, since the decease of the said H. C.; \* 2104 this defendant pleads thereto, and for plea saith, that the said I. G., under whom this defendant claims, departed this life in or about the year —, and that the said H. C., this defendant's testator, afterwards also departed this life, in the month of —, in the year —. and that the matters and effects pretended to have been received by the said H. C., or by this defendant, and the goods and commodities pretended to have been consigned (if any sums of money, goods, or effects were received by the said H. C., or by this defendant, which this defendant does not admit), were received by the said H. C., or by this defendant, above six years before this defendant was served with any process of this honorable Court, to answer the said bill, or any process whatsoever was sued against this defendant to account for the same; and that if the said plaintiff had any cause of action or suit against this defendant, or against the said H. C. for or concerning any of the said matters, which this defendant does not admit, that such cause of action or suit did not accrue or arise within six years before the said bill was filed, or this defendant served with process; nor did this defendant, or his testator, at any time within six years before the said bill was exhibited, or process sued out against this defendant, promise or agree to come to any account, or to make satisfaction, or to pay any sum or sums of money, for or by reason of any of the said matters; and that by a certain act of — for the limitation of actions and suits at Law, it was enacted, &c. [*state the statute to be pleaded*], and this defendant pleads the several matters aforesaid in bar to so much of the plaintiff's said demand as aforesaid, and prays the judgment of this honorable Court thereon; and this defendant for answer, &c.

VII. THAT SUPPOSING THE PLAINTIFF ENTITLED TO THE ASSISTANCE OF THE COURT TO ASSERT A RIGHT, THE DEFENDANT IS EQUALLY ENTITLED TO THE PROTECTION OF THE COURT TO DEFEND HIS POSSESSION.

19. *Plea of purchase for a valuable consideration, without notice.*

This defendant by protestation, &c. [*title and commencement as above*], as to so much of the said bill as seeks an account of what is due and owing to the said plaintiff, in respect of the annuity of \$ — therein mentioned, and stated to be charged upon, and issuing out of the premises therein and hereinafter mentioned, this defendant doth plead thereto, and for plea saith that A. B., previously to and on the — day of —, 18—, was, or pretended to be, seised in fee-simple, and was in, or pretended to be in, the actual possession of all those \*parcels of real estate in the said bill mentioned and described, \* 2105 free from all incumbrances whatsoever; and this defendant, believing that the said A. B. was so seised and entitled, and that the

said premises were in fact free from all incumbrances, on the — day of —, agreed with the said A. B. for the absolute purchase of the fee-simple, and inheritance thereof; whereupon certain indentures of lease and release, bearing date respectively on, &c., between the said A. B. of the one part, and this defendant of the other part, were duly made and executed; and by the said indenture of release the said A. B. in consideration of the sum of \$ — paid to him by this defendant, bargained, sold, released, and confirmed unto this defendant, all, &c. [*set out the parcels verbatim from the deed*], to hold unto, and to the use of this defendant, his heirs and assigns, forever; and in the said indenture of release is contained a covenant from the said A. B. with this defendant, that he, the said A. B., was absolutely seised of the said premises, and that the same and each of them and every part thereof were and was free from all incumbrances; as by the said indentures of lease and release respectively, reference being thereto had, will more fully appear; and this defendant doth aver, that the said sum of \$ —, the consideration money in said indenture of release mentioned, was actually paid by this defendant to the said A. B. at the time the said indenture of release bears date; and this defendant doth also aver, that at or before the respective times of the execution of the said indentures of lease and release, by the said A. B. and this defendant, and of the payment of the said purchase-money, he, this defendant, had no notice whatsoever of the said annuity of \$ —, now claimed by the said plaintiff, or of any other incumbrance whatsoever, that in any wise affected the said premises, so purchased by this defendant as aforesaid, or any of them, or any part thereof; and this defendant insists that he is a *bona fide* purchaser of the said premises for a good and valuable consideration, and without notice of the said annuity claimed by the plaintiff; all which matters and things this defendant doth aver and plead in bar to so much of the said plaintiff's bill as is hereinbefore particularly mentioned; and prays the judgment of this honorable Court, whether he should make any further answer to so much of the said bill as is hereinbefore pleaded to; and this defendant not waiving his said plea, but relying thereon, and for better supporting the same, for answer saith, that he had not at any time before, or at the time of purchasing the said premises, or since, until the said plaintiff's bill was filed, any notice whatsoever, either expressed or implied, of the said annuity of \$ —, claimed by the said plaintiff, or that the same or any other incumbrance whatsoever was charged upon or in any wise affected the said premises so purchased as aforesaid, or any of them, or any part thereof; and this defendant denies, &c.

\* 20. *A form of plea of purchaser for valuable consideration, &c.,* \* 2106  
*prescribed by Chancery Rules of New Hampshire.*

IN THE SUPREME JUDICIAL COURT.

H —, ss.

T. P. v. T. D. & another.

The plea of T. M.

The said T. M. says that on the — day of —, 18—, he loaned to said T. D. the sum of \$600, and the said T. D., to secure the payment thereof, made and executed to him his promissory note of that date for \$600, and interest, in one year, and executed and delivered to him a good and sufficient deed of mortgage of said premises in said bill mentioned, with condition that if said T. D. should pay to this defendant said sum of \$600, and interest, in one year, the said deed should be void, as by the said deed duly executed, acknowledged, and recorded, and ready to be produced in said Court, appears.

And the said mortgage deed was duly recorded in the Registry of Deeds of said county of H., on the — day of —, 1850, and the alleged deed of mortgage made by said T. D. to the plaintiff was not left for record nor recorded in said Registry until the — day of —, 185—.

And this defendant avers that said sum of \$600 was paid by him to said T. D., in money, really and *bona fide*, and said deed of mortgage received and recorded, without notice of the plaintiff's pretended title set forth in the bill, and without any reason to believe or suspect that any such loan or mortgage of said premises to the plaintiff had been made.

T. M., by  
 A. D. *his Solicitor.*

VIII. THAT THE BILL IS DEFICIENT TO ANSWER THE PURPOSES OF  
 COMPLETE JUSTICE.

21. *Plea of want of proper parties.*

[*Title and commencement.*]

As to so much of the said plaintiff's bill as seeks an account from this defendant, as executor and heir-at-law of H. E., Esq., deceased, in the said bill named, this defendant's late brother, for what remains due and owing upon the bond in the said bill mentioned, bearing date the — day of —, in the year —, and payment by this defendant as such executor and heir-at-law of the said H. E., deceased, as afore-said, of what shall be found due on taking such account; this defendant \*doth plead thereto, and for plea saith, that no part \* 2107  
 of the sum of \$ — for securing the repayment whereof the said bond was executed, was paid to or received by the said H. E., but

that the whole was paid unto A. W., in the said bond and in the said bill also named and received by him for his sole use, and that the said H. E. was only surety for the said A. W., and that the said plaintiff afterwards accepted a composition for what he alleged to be due on said bond from the said A. W. without the privity of the said H. E. in his lifetime, or this defendant since the death of the said H. E., which took place on or about the — day of —, as in the said bill mentioned, since which no demand has been made on this defendant for any money alleged to be due on the said bond; and that the said A. W. died several years ago, seised of considerable real estates, and also possessed of a large personal estate; and that his heir-at-law, or the devisee of his real estate, and also the representative of his personal estate, ought to be, but are not, made parties to the said bill. Therefore, &c. [*Conclude as above*].

IX. THAT THE SITUATION OF THE DEFENDANT RENDERS IT IMPROPER FOR A COURT OF EQUITY TO COMPEL A DISCOVERY.

22. *Plea that the discovery sought by the bill would betray the confidence reposed in the defendant as an attorney.*

[*Title and commencement as above.*]

As to so much and such part of the said bill as seeks a discovery from this defendant of the title of W. W., Esq., another defendant in the said bill named, to all or any of the messuages, lands, &c., late of C. W., Esq., his late grandfather, deceased, in the said bill also named, this defendant doth plead thereto, and for plea saith, that he, this defendant, is duly admitted and sworn an attorney of —, and also a solicitor of this honorable Court, and has for several years past practised, and now practises as such; and this defendant was employed by C. W., Esq., deceased, the late father of the said other defendant W. W. in the lifetime of the said C. W., and since his decease has also been employed in that capacity by the said other defendant J. W., the mother and guardian of the said W. W., during his minority, and by the said W. W. since he attained his age of twenty-one years; and in that capacity only, or by means of such employment only, has had the inspection and perusal of any of the title deeds of and belonging to the said estate, or any part or parts thereof, for the use and service of his said clients, and therefore ought not, as this defendant is

\* 2108 advised, \* to be compelled to discover the same. Wherefore this defendant doth plead the several matters aforesaid, in bar to such discovery as aforesaid is sought by the said bill, and humbly prays the judgment of this honorable Court, whether he is bound to make any further or other answer thereto.

## X. PLEAS TO BILLS NOT ORIGINAL.

23. *Plea to a bill of revivor.*[*Title and commencement as above.*]

That the said plaintiff is not, as stated in the said bill of revivor, the personal representative of A. B., deceased, the testator therein named, and as such entitled to revive the said suit in the said bill of revivor mentioned against this defendant; but the said plaintiff is the administrator only of C. D., late of, &c., deceased, who died intestate on the — day of — last, and was the sole executor of the said A. B.: and that letters of administration of the goods and estate of the said A. B., unadministered by the said C. D. in his lifetime, have, since the death of the said C. D., been duly granted by the proper Court to E. F., of, &c., who thereby became, and now is, the legal personal representative of the said A. B. Wherefore the said defendant demands the judgment of this honorable Court, whether he shall be compelled to answer the said plaintiff's bill, and humbly prays to be dismissed with his reasonable costs in this behalf sustained.

24. *Plea to a supplemental bill.*[*Title and commencement as above.*]

That the said matters and things in the said plaintiff's present bill, stated and set forth by way of supplement, arose, and were well known to the said plaintiff, before and at the time the said plaintiff filed his original bill in this cause, and that such said several matters and things can now be introduced, and ought so to be, if necessary, by amending said original bill. Wherefore, &c.

## ANSWERS.

## I. FORMS OF COMMENCEMENT AND CONCLUSION OF ANSWERS.

1. *Commencement.*

*The title of a defence by answer to a suit in Chancery.*

THE answer of —, the defendant [*or*, one of the defendants], *or*, the joint and several answers of —, the defendants [*or*, two of the defendants], to the bill of complaint of —, plaintiffs.

*By an infant.*

The answer of C. D., an infant under the age of twenty-one years, by L. M., his guardian, defendant [*or*, one of the defendants], to the bill of complaint of A. B., plaintiff.

*By husband and wife.*

The joint answer of A. B. and M. his wife, defendants, to the bill of complaint of A. B., the plaintiff.

*Or,*

The joint answer of A. B. and C. his wife, the [*or*, two of the] above-named defendants, to the bill, &c. [*or, if they were married since she was made a defendant, say*]: The joint answer of A. B. and C. his wife, lately, and in the bill called, C. D., spinster [*or*, widow], to the will, &c.

In answer to the said bill, we, A. B. and C. his wife, say as follows: —

*Wife separately under an order.*

The answer of C. B., one of the above-named defendants, and the wife of [the defendant] A. B., to the bill, &c.

In answer to the said bill, I, C. B., answering separately from my husband, in pursuance of an order of this honorable Court, dated the — day of —, 18—, authorizing me so to do, say as follows: —



*By a lunatic or idiot, &c.*

The joint answer of E. F., a lunatic [*or, idiot or imbecile person*], by T. P., his guardian *ad litem*, and T. P., committee of the said E. F., defendants, to the bill of complaint of A. B., the plaintiff.

\* *Where the bill misstates the names of defendants.* \* 2110

The joint and several answer of J. L., in the bill called R. L., and of C. E., in the bill called D. E., defendants, to the bill of complaint of A. B., plaintiff.

2. *Introduction, or words of course, preceding an answer.*

This defendant [*or, these defendants respectively*], now and at all times hereafter saving to himself [*or, themselves*] all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto or to so much thereof as this defendant is [*or, these defendants are*] advised it is material or necessary for him [*or, them*] to make answer to, answering saith [*or, severally answering say*].

*By a formal party who is a stranger to the facts.*] This defendant saving and reserving to himself, &c. (*as above*), answers and says, that he is a stranger to all and singular the matters and things in the said plaintiff's bill of complaint contained, and therefore leaves the plaintiff to make such proof thereof as he shall be able to produce; without this, that, &c.

*By an infant.*] This defendant, answering by his said guardian, saith that he is an infant of the age of — years or thereabouts, and he therefore submits his rights and interests in the matters in question in this cause to the protection of this honorable Court; without this, that, &c.

3. *Conclusion of answers.*

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause, or thing, in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable Court shall direct; and humbly prays to be hence dismissed with his reasonable costs and charges, in this behalf most wrongfully sustained.

*Where party claims the same benefit of defence as if the bill had been demurred to for want of Equity.]* And this defendant submits to this honorable Court, that all and every of the matters in said plaintiff's \* 2111 bill mentioned and complained of are matters which may be tried and determined at Law, and with respect to which the said plaintiff is not entitled to any relief from a Court of Equity, and this defendant hopes he shall have the same benefit of this defence as if he had demurred to the said plaintiff's bill. And this defendant denies, &c.

*Another form.]* I submit that the plaintiffs have not, on their bill, shown any case in Equity, or case entitling them to proceed against me in this honorable Court; and I pray all such benefit as if I had demurred to the said bill.

#### 4. *Model form of answer in England.*<sup>1</sup>

In Chancery.

A. B. . . . . Plaintiff,  
and

C. D. [and E. F.] . . . . Defendants.

*Commencement.]* The answer of C. D., one of the above-named defendants [*or*, the above-named defendant, *as the case may be*], to the bill of complaint [*or*, the amended bill of complaint, *or*, to the supplemental bill of complaint, *or*, to the original bill of complaint, and also to the supplemental bill of complaint] of the above-named plaintiff.

In answer to the said bill, I, C. D., say as follows: —

1. I admit that the indenture of the fourteenth day of May, 1854, in the plaintiff's bill mentioned, was made and executed between and by the several parties, and was to the purport and effect in the said bill set forth, but I crave leave to refer to the said indenture when the same shall be produced to this honorable Court.

2. I believe that such representations as set forth in the — of the interrogatories to the plaintiff's bill were made by — therein mentioned.

3. I deny that I did on the — day of —, or at any other time, state, &c.

4. [*A statement of circumstances varying from the statement thereof in the plaintiff's bill.*]

5. Save as aforesaid, I deny, &c. [*here the allegations in the plaintiff's bill are denied*].

*Or,*

6. Save as aforesaid, I am unable to set forth as to my knowledge, remembrance, information, or belief, whether, &c.

7. I claim, &c. [*a statement of the defendant's claim or case*].

[*Counsel's signature.*]  
Sworn, &c.

<sup>1</sup> The answer of a defendant in England must now be in the first person, and divided into paragraphs numbered consecutively, each paragraph containing as nearly as may be a separate and distinct allegation. 15 & 16 Vic. c. 86, § 14, and Orders of 7th August, 1852.

\* 5. *Answer of an infant.*

\* 2112

[*Title of cause.*]

The answer of A. B., one of the above-named defendants, an infant under the age of twenty-one years, by —, his guardian.

In answer to the said bill, I, A. B., by —, my guardian, say as follows:—

I am an infant under the age of twenty-one years, that is to say, of the age of — years, and I submit my rights and interests in the matters in question in this cause to the care and protection of this honorable Court.

(*Counsel's signature.*)

6. *Answer of adults and infants.*

The joint and several answer of A. B. and C. D., and of E. F. and G. H., infants, the above-named defendants [*or*, four of the above-named defendants], by —, their guardian.

7. *In case of an insufficient answer.*

The further answer of —, one of the above-named defendants, to the bill of complaint of the above-named plaintiff.

8. *Further answer to original bill, and answer to amended bill.*

The further answer of —, one, &c., to the original bill of complaint of the above-named plaintiff, and the answer of the said defendant to the amended bill of complaint of the plaintiff.

9. *Answer to original bill and bill of revivor and supplement.*

The answer of —, one, &c., to the original bill of complaint of —, the above-named plaintiff, and —, also to the bill of revivor and supplement of the said plaintiff.

In answer to the said original bill, I, —, say as follows, &c.

In answer to the said bill of revivor and supplement, I, — say as follows, &c.

10. *Answer of lunatic and his committee.*

The joint and several answer of A. B., a lunatic, by C. D., his [guardian and] committee, and the said C. D., two of the above-named defendants, to the bill of complaint of the above-named plaintiff.

\* 11. *Statement in answer by husband disclaiming any interest in legacy bequeathed to his wife.* \* 2113

I have long been separated from my wife, and I disclaim all right, title, and interest in or to the said legacy or sum of \$—, so bequeathed to my said wife A. S., for her separate use by the will of the said —, as in the said bill mentioned, and every part thereof.

12. *Statement in answer of a feme covert separated from her husband.*

I have long been separated from my husband, and I humbly submit that I ought to be allowed all the costs, charges, and expenses incurred by me in putting in my answer to the said bill of complaint and in other the proceedings in this suit.<sup>1</sup>

13. *Answer and disclaimer.*<sup>2</sup>

[*Title and commencement as before.*]

I have never received any part of the estate or effects of the testator, or in any wise intermeddled therein, and I have never assented to or in any manner accepted the said devise made to me by the said will jointly with the said —, and I have never in any manner consented to become a trustee of the said will or in any manner acted or interfered in the trusts thereof; and, in fact, I have at all times refused to accept, and do now refuse to accept, the office of trustee of the said will; and I have always disclaimed, and do hereby disclaim and renounce the said devise made to me by the said will, and all and singular the estates and property which could or might pass under or by virtue thereof, and all estate and interest therein, and also the trusts of the said will and the office or duty of executing the same.

\*2114 \*14. *Where a defendant objects to answer particular interrogatories.*

As to the several interrogatories numbered 18, &c., and as to such of the other interrogatories [*or, parts of interrogatories*] (if any) as I may not have answered, I am advised and humbly submit that I am not bound to answer the same, and I therefore decline to answer the said interrogatories [*and parts of interrogatories*]; and I claim the same benefit of the objection as if I had demurred to the same or to the discovery sought thereby.<sup>1</sup>

And I also humbly submit that the plaintiffs are not entitled in this suit to the relief sought in and by the third, &c., paragraphs of the

<sup>1</sup> An order must be obtained for a married woman to answer separately from her husband. *Ante*, Vol. I. pp. 180, 181, 182, 498, 499.

<sup>2</sup> *General form of Disclaimer.* — In Chancery. Between (*set out the full title of cause*).

The answer and disclaimer of A. B., the above-named defendant [*or, one of the above-named defendants*], to the bill of complaint of the above-named plaintiff.

*Or,*

The joint and several answer and disclaimer of A. B. and C. D., the [*or, two of the*] above-named defendants, to the bill of complaint of the above-named plaintiff. In answer to the said bill, I, A. B. [*or, we, A. B. and C. D.*], say as follows: —

“I [*or, we*] have not, and do not claim, and never had or claimed to have, any right or

interest in any of the matters in question in this suit, and I [*or, we*] disclaim all right, title, and interest, legal and equitable in any of the said matters; and I [*or, we*] say that if I [*or, we*] had been applied to by the plaintiff before the filing of his bill, I [*or, we*] should have disclaimed all such right, title, and interest; and I [*or, we*] submit that the bill ought to be dismissed as against me [*or, us*] with costs. (*Name of Counsel.*)”

The disclaimer should be signed by counsel and by the defendant.

<sup>1</sup> *Ante*, Vol. I. pp. 720, 721; *Mason v. Wakeman*, 2 Phil. 516; *Swinborne v. Nelson*, 16 Beav. 416; *Bates v. Christ's College, Cambridge*, 5 W. R. 337.

prayer of the supplemental bill, or for the purposes thereof to have any accounts, directions, or inquiries taken, given, or made; and I claim the same benefit of the objection as if I had demurred to the relief so sought.

15. *Statement in answer to prevent plaintiff from calling for the production of documents in defendant's possession.*

I have now in my possession or power the several letters, papers, and writings, relating to the matters in the bill mentioned, or some of them; and I have in the schedule hereto, which I pray may be taken as part of this my answer, set forth a list or schedule of all the said letters, papers, and writings; but I deny that thereby or otherwise, if the same were produced,<sup>2</sup> the truth of the matters in the said bill mentioned, or any of them, would appear, further or otherwise, than as the same is hereinbefore admitted.

Such of the said letters, papers, and writings as are set forth in the first part of said schedule are of great importance to the claim made by me in my said action, and are or contain the evidence on which I am advised and intend mainly to rely at the trial of the said action; and the said letters, papers, and writings, as well those in the second and third parts as those in the first part of the said schedule, or any of them, do not nor does, as I am advised and verily believe, contain any evidence whatever in support of or tending to support the plaintiff's pleas in the said action, or any of such pleas, and are not, nor is, in any manner, material to the plaintiff's case.

*As to confidential communications.]* Such of the said letters, papers, and writings as are set forth in the second part of the said schedule were and are private<sup>3</sup> and confidential communications between me \* and my solicitors or legal advisers in the ordinary course \* 2115 of professional business, and all and every of them relate to the matters in dispute between me and the plaintiff in the said action; and the plaintiff has not, as I am advised and verily believe, any right or title to the production of, or any interest whatever in, the letters, papers, and writings in the said schedule mentioned, or any of them.

16. *Statement in an answer by mortgagees raising the defence of the Statute of Limitations.*

The said G. S., deceased, did not, as we severally verily believe, at any time during the period he was so in possession or receipt of the rents and profits of the said mortgaged hereditaments as aforesaid, sign or give any acknowledgment in writing or otherwise, of the title of the said J. M. and T. M., or either of them, or of any person or persons claiming under them or either of them, to the said J. M. and T. M., or either of them, or to the plaintiffs in this suit or either of them, or to

<sup>2</sup> See *Peile v. Stoddart*, 1 M. & G. 192. In *Manby v. Bewicke*, 2 Jur. N. S. 671.

<sup>3</sup> See *ante*, Vol. I. pp. 570, 571,

the defendant W. T., or to any person or persons whatsoever claiming any estate or interest in the said hereditaments, or to the agent or agents of the said J. M. and T. M., or of the plaintiffs or of the defendant W. T., or either of them; nor have or hath one or either of us, at any time or times subsequently to the decease of the said G. S., signed or given any acknowledgment, &c. (*as above*).

The said J. M. and T. M. have not nor hath either of them, nor have or hath the plaintiffs or the defendant W. T., or any or either of them, made any payment whatever, either in respect of interest of the said several mortgage securities or any or either of them, or of the principal moneys thereby secured, or any part thereof, subsequently to the time when the said G. S., deceased, so entered into the possession or receipt of the rents and profits of the mortgaged hereditaments and premises as aforesaid.

We severally claim the benefit of the provision made in and by the statute passed in the session holden in the third and fourth years of the reign of his late Majesty, William the Fourth, "For the limitation of actions, and suits relating to real property, and for simplifying the remedies for trying the rights thereto," in bar to the relief sought by the plaintiffs in this suit, in the like manner as if we had pleaded the same.<sup>1</sup>

\* 2116 \* 17. *Another form of answer of the Statute of Limitations.*

And the defendants, in addition to the foregoing answer, aver that the cause of action, if any there may be, arising to the plaintiffs on account or by reason of the several allegations and complaints in their said bill contained, did not accrue within six years before the said bill was filed, and this allegation the defendants make in bar of the plaintiffs' bill, and pray that they may have the same benefit therefrom as if they had formally pleaded the same.

18. *The like.*

I [*or, we severally*] claim the benefit of the provisions made in and by the Public Statutes of Massachusetts, c. 197 [*or as the case may be*], respecting the limitation of — actions, and of all other Statutes of Limitation, in bar to the relief sought by the plaintiff in this suit, in the like manner as if I [*or, we*] had pleaded the same.

19. *Statement in answer of a trustee of acquiescence on the part of the cestui que trust to the application of the trust fund.*

I consented to sell the said — Bank Annuities, and did sell the same, and paid and applied the produce thereof, at the special instance and request of the plaintiff [as well as of the defendant], in, &c.

<sup>1</sup> See *Jortin v. Southeastern Ry. Co.* 6 De G. M. & G. 270; 1 Jur. N. S. 433; *Staley v. Barrett*, 5 W. Rep. 188. The defendant who relies upon the Statute of Limitations as a defence to a bill must raise that defence by plea or answer, although the plaintiff does not require an answer. *Holding v. Barton*, 1 Sm. & G. App. xxv. And see, upon the general principle that the defence must be made by the pleadings, *Sullivan v. Portland &c. R. Co.* 94 U. S. 806.

[*Set forth the correspondence, documents, or admissions tending to establish this allegation.*<sup>1</sup>]

I claim to have the interest in the said — applied in or towards satisfying any sum of money which I may be called upon or be bound to pay in respect of the said sale and application of the said trust fund.

20. *An answer insisting on the benefit of the Statute of Frauds, as if it had been pleaded by the defendant.*

[*Title and commencement as above.*]

That by a certain statute — made and passed in the — for the prevention of frauds and perjuries, and commonly called the Statute of Frauds, all contracts and agreements relating to lands, except as therein is excepted, are required to be reduced into writing, and signed by the party or parties to be bound thereby; and that the said agreement in the said bill mentioned, and therein alleged to have been made and \* entered into by this defendant and the said plaintiff, was \* 2117 not reduced into writing and executed pursuant to the said statute, and therefore this defendant insists that the same is void as against this defendant; and that he cannot be affected thereby, and this defendant claims the same benefit as if he had pleaded the same statute in this cause; and this defendant, for the reasons, and under the circumstances aforesaid, is advised, and insists, that the said plaintiff is not entitled to any relief against this defendant touching the matters complained of in the said bill. [*Conclude as above.*]

21. *Another form of answer claiming the benefit of the Statute of Frauds.*

I say that no agreement in writing for purchase of the said premises or any part thereof, nor any memorandum, or note thereof in writing, has been made, entered into, or signed by me or by any person thereunto by me lawfully authorized, and I claim the benefit of the statute passed in the twenty-ninth year of Charles the Second [*or*, of the Public Statutes of Massachusetts, c. 78], for the prevention of frauds and perjuries, in the same manner as if I had pleaded or demurred to the plaintiff's bill.<sup>1</sup>

<sup>1</sup> If the *cestui que trust* joins with the trustee in that which is a breach of trust, knowing the circumstances, such *cestui que trust* can never complain of such breach of trust. Per Lord Eldon, in *Walker v. Symonds*, 3 Swanst. 64. And the interest of a *cestui que trust*, who concurs with a trustee in a breach of trust, is liable to indemnify the trustee. *Booth v. Booth*, 1 Beav. 125; *Farrar v. Barraclough*, 2 Sm. & G. 231; *Lockhart v. Reilly*, 25 L. J. Ch. 697; *Baynard v. Woolley*, 20 Beav. 583; *Blythe v. Fladgate*, [1891] 1 Ch. 337.

<sup>1</sup> If a defendant does not insist by his answer upon the benefit of the Statute of Frauds, he cannot avail himself of its provisions at the hearing, although he denies the agreement set up by the bill. *Clifford v. Turrell*, 1 Y. & Coll. C. C. 138; see also *Baskett v. Cafe*, 4 De G. & S. 388; *Merritt v. Brown*, 21 N. J. Eq. 401. And see, where the answer denies the agreement, *Johns v. Norris*, 22 N. J. Eq. 109.

22. *Another more extended form.*

And this defendant sets forth, in answer to the several averments of contracts, agreements, promises, and trusts concerning the premises, with, to, or for the benefit of said plaintiff, in the said bill contained, and to so much of the said bill as sets forth any pretended contract, agreement, trust, or confidence between the said plaintiff and defendant, or as seeks any relief or discovery of this defendant of or concerning any pretended contract, agreement, trust, or confidence between this defendant and the plaintiff touching the said lands mentioned in said bill or any part thereof,—the Statute of Frauds, as enacted in the laws of the State [or, Commonwealth] of — by the — section of the — chapter, and the — section of the — chapter, of the — statutes.

And this defendant says, that neither he, nor any person by him lawfully authorized thereto, did ever make or sign any note or memorandum in writing [or (*if so*) any writing whatsoever] of or containing any such contract, promise, or agreement, or grant, or declaration [or (*if so*) any contract, promise, or agreement, or grant, or declaration \* 2118 \* whatsoever] with, to, or for the benefit of the said plaintiff, touching the said lands, or creating any estate or interest therein, or creating or declaring any trust respecting the same, in or for the benefit of the said plaintiff; and this defendant insists upon the said statutes and claims the same benefit therefrom as if he had pleaded the same.

23. *Form of answer prescribed by Chancery Rules in New Hampshire.**Answer.*

In the Supreme Judicial Court.

H—, ss.

T. P. v. T. D. & another.

The answer of T. A.

The said T. A. says said T. D., on the — day of —, 18—, was greatly in debt, beyond his means to pay, and for the purpose of delaying and defrauding his creditors, without any valuable consideration paid by said T. P., or received by said T. D., he did then make and deliver to said T. P. his promissory note of that date for the sum of \$1000, and interest, payable in one year, with interest, in said bill mentioned, and executed and delivered to said T. P. the said mortgage in said bill set forth.

On the — day of —, 18—, the said T. D. being then and long before justly indebted to this defendant in the sum of \$800, upon and by virtue of certain promissory notes theretofore, for a valuable and *bonâ fide* consideration, made and executed to him, this defendant became urgent for the payment of the same; and said T. D. then proposed to make and execute to this defendant a deed of conveyance of said premises in said bill described; and this defendant, having no notice of the said pretended mortgage, or reason to believe or suspect



the existence of the same, but being on friendly terms with the said T. P., did consult and advise with him relative to the purchasing of said T. D. the premises aforesaid, for said sum of eight hundred dollars which he now alleges to be greatly above the value thereof, and the said T. P., did then and there strongly recommend and advise this defendant to make the said purchase, and this defendant thereupon agreed to buy and did purchase said premises for eight hundred dollars, and took from T. D. a good and valid conveyance, as he is advised and believes, of said premises, and actually and in good faith paid the sum of eight hundred dollars, by giving up and surrendering to said T. D. his said notes without notice of the said title now by said T. P. in said bill set up.

T. A., by

Q. H., *his Solicitor.*

\* COMMON FORMS OF STATEMENTS AND ALLEGATIONS IN ANSWERS. \* 2119

24. *Accounts ; reference to book containing them.*

The dealings and transactions in respect of the said trade are entered in a large book, or ledger, kept on the premises at —, and the items in respect thereof are contained in 164 pages, with double columns, of the said book ; and to set out such items in detail would occasion very great expense ; but we are willing, if the Court shall think proper so to direct, that the plaintiff or his solicitor should inspect the said book, and take extracts therefrom, at all reasonable times of the day.

25. *Accounts refused, as being useless before decree.*

And we say and submit, that it would only occasion great and useless expense were we in this our answer to set forth any further or fuller account of the rents and profits aforesaid ; and that the same ought to be taken, if at all, by and under the directions and decree of this honorable Court.

26. *Admission for purposes of the suit.*<sup>1</sup>

We have no personal knowledge of the fact, but, for the purposes of the suit, we admit that, &c.

27. *Claims made by defendant.*

I claim to be interested in the matters of this suit, by virtue of, &c.

The short particulars of the mortgage now vested in us, and of our title thereto, are as follows, &c.

We claim to be equitable mortgagees of the hereditaments mentioned in the said bill, together with other hereditaments, under a memorandum in the words and figures following ; that is to say, &c.

<sup>1</sup> In Illinois, the plaintiff must prove all the material allegations of his bill which are neither admitted or denied in the answer. *Glos. r. Randolph*, 139 Ill. 197.

We claim a lien on the shares of, &c., for so much of the said debt as arises from the unpaid purchase-money of the same shares respectively, and the interest thereof.

28. *Craving leave for greater certainty.*

We admit that, &c. ; *or*, we believe that, &c. ; but, for greater certainty, we crave leave to refer to the said, &c., when produced.

29. *Craving leave to refer to co-defendants' answer.*

I know little or nothing respecting the deeds, dealings, and transactions stated in the said amended bill ; but I have seen a copy  
\* 2120 of the \* answer proposed to be forthwith put in to the amended bill by the defendants J. L. and G. W. F. ; and I have no doubt but that the statements contained in such answer are correct. However, for my greater certainty, as to the contents of deeds and other written documents, I crave leave to refer to such deeds or documents. Under the circumstances hereinbefore stated, and to avoid expense and prolixity, I abstain from answering, categorically, the interrogatories filed for the examination of the last-named defendants and myself in answer to the amended bill ; but if the plaintiffs so desire I am ready and willing to put in a full answer to the said amended bill.

30. *Information and belief.*<sup>1</sup>

I have been informed and believe, that, &c.

I believe that, &c.

We have no reason to doubt, and therefore we believe that, &c.

We believe that the statements contained in the paragraphs numbered respectively from 1 to 8, both inclusive, of the plaintiff's bill of complaint are true, except in the particulars or respect hereinafter mentioned ; that is to say, &c.

I, this defendant W. R., say, and we, these other defendants, believe it to be true, that, &c.

We have no personal knowledge of the matters inquired after by the — interrogatory filed in this cause ; but we have no reason to doubt, and therefore we believe, that, &c.

31. *Ignorance.*

I [*or*, we] do not know, and cannot set forth as to my [*or*, as to either of our] belief or otherwise, whether or not it is alleged or is the fact that, &c.

<sup>1</sup> A sworn answer on information and belief raises an issue of fact requiring proof, but need not be overcome by two witnesses or one witness with corroborating circumstances. *Snell v. Fewell*, 64 Miss. 655.

32. *Qualified denial.*<sup>1</sup>

Save as herein appears, it is not the fact, &c.

Save as herein appears [*or, save as by the said schedule appears*], I do not know, &c.

33. *Reference to schedule.*

I have in the — schedule hereto, and which I pray may be taken as part of this my answer, set forth, to the best of my knowledge, information, and belief, a description of, &c.

34. *Release craving same benefit as if pleaded.*

We submit and humbly insist, that the said release so executed as aforesaid, and the payment of the said sum of \$—, and the receipt \*given for the same, is a full discharge; and we claim \* 2121 the same benefit as if we had pleaded the same release. Nevertheless, we are willing and hereby submit, to account as this honorable Court may think fit.

35. *Settled accounts: claim of.*

The account so stated and settled was in fact stated and settled by the said A. B. and myself, as it purports to be, on the day of the date thereof; and I claim the benefit thereof as a settled account.

36. *Submission by trustees to act.*

We submit in all things to act as this honorable Court shall direct, and we claim to have our costs, charges, and expenses, properly incurred, paid out of the estate of the said testator.

37. *Traverse.*

The said J. S. died on the — day of —, and not on the — day of —, as in the second paragraph of the said bill erroneously stated; but save as aforesaid, we do not know, and are unable, as to our belief or otherwise, to set forth whether or not the statements, or some or one or which of the statements, contained in the paragraphs numbered respectively from 1 to 8, both inclusive, of the plaintiff's bill of complaint are or is true, or which of them are or is or in what respect untrue, or how otherwise.

38. *Trustee; desire to be discharged.*

I have never in any manner intermeddled with the said trust estate, nor received any of the rents and profits thereof; and I am very desirous

<sup>1</sup> In California a replication traversing new matter alleged in the answer is unnecessary. *Grangers' Business Ass'n v. Clark*, 84 Cal. 201.

to be discharged from the trusts in the bill mentioned, and I am ready and willing to convey and release the trust premises to such persons, or to do such other acts as this honorable Court shall direct, for that purpose, upon being indemnified in so doing, and having my costs and expenses.

39. *Vexatious suit; settled accounts; claim of benefit of defence as if raised by plea or demurrer.*

We submit to the judgment of this honorable Court, and humbly insist that this suit is altogether unnecessary and vexatious; and that even if the plaintiff had been entitled to any such relief as is prayed by the said bill, the same might have been obtained by proceedings at Law; but we say that a large sum of money has been for a long time, and now is, justly due and owing to us from the plaintiff, and that \* 2122 \* during the whole of the transactions in the said bill mentioned we were in advance with creditors of the plaintiff; and that the plaintiff has repeatedly, and partly in the letters hereinbefore set forth, acknowledged the accuracy of the accounts rendered by us to him; and has treated the same as being, as in fact they were, settled accounts; and we claim the same benefit from this our answer as if we had pleaded the several matters herein stated, or any of them, or as if we had demurred to the said bill.

40. *Want of interest in plaintiff; craving same benefit as if defence by demurrer.*

I am advised, and humbly submit, that the plaintiff has not any interest in the estate of the said testator, or in the matters in question in this suit, nor any such estate or interest in the said testator's estate, or the matters aforesaid, as to entitle the plaintiff to sustain this suit; and I crave the same benefit from this defence as if I had demurred to the said bill.

41. *Claim of benefit of same defence to amended as to original bill.*

We submit that the plaintiff has not by his said amended bill entitled himself to any equitable relief as against us; and we accordingly claim the benefit of the same objections to the said amended bill which are made by our said answer to the said original bill.

REPLICATION.<sup>1</sup>*Form of General Replication.**The replication of A. B., plaintiff, to the answer of C. D., defendant.*

THIS repliant, saving and reserving to himself all, and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith, that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that, any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove, as this honorable Court shall direct; and humbly prays, as in and by his said bill he hath already prayed.

*Recent English Form of Replication.*

Between A. B. . . . . Plaintiff,  
and  
C. D., E. F., G. H., &c. . . . Defendants.

The plaintiff in this cause hereby joins issue with the defendant C. D., and will hear the cause on bill and answer against the defendant E. F. [all the defendants against whom the cause is to be heard on bill and answer], or on the order to take the bill as confessed against the defendant G. H.

*Form of Replication prescribed in Chancery Rules of New Hampshire.*

In the Supreme Judicial Court.

H—, ss.

T. P. v. T. D. &amp; another.

The said plaintiff says his bill is true, and the defendant's answer, as set forth, is not true, and this he is ready to prove.

T. P., by

A. S., *his Solicitor.*

<sup>1</sup> By the 16th Mass.Ch. rule, as a substitute for the general replication now in use, the plaintiff shall enter in the cause, "that he joins issue on the answer;" and by the same rule it is provid-

ed that no special replication to an answer shall be filed, but by leave of Court, or one of the justices thereof, for cause shown.

## EXCEPTIONS TO ANSWERS.

1. *For insufficiency. (English Form.)*

IN Chancery.

Between E. D. . . . . Plaintiff,  
 and  
 J. P. . . . . Defendant.

Exceptions taken by the above-named plaintiff to the answer of the defendant [*or, if more than one defendant, of the defendant——*] for insufficiency.

*First exception.*] For that the said defendant has not in and by his said answer, according to the best of his knowledge, remembrance, information, and belief, answered and set forth whether, &c.

*Second exception.*] For that the defendant has not in and by his said answer in manner aforesaid answered and set forth whether, &c.

[*And so with respect to the other exceptions, using the words of the interrogatory not answered.*<sup>1</sup>]

In all or some of which particulars the said plaintiff is advised that the said answer of the defendant is evasive and insufficient, and ought to be amended, and humbly prays the same may be amended accordingly.

[*Counsel's name.*]

2. *For scandal.*

IN Chancery.

Between E. D. . . . . Plaintiff,  
 and  
 J. P. . . . . Defendant.

Exceptions for scandal taken by the above-named defendant A. B. [*or, plaintiff, &c.*] to the bill of complaint of the above-named plaintiff

<sup>1</sup> Each exception should be confined to a distinct question, although the interrogatory, as numbered, may contain several questions; at least it ought to be so confined, if there is any ground for the defendant to contend that he has answered a part of the interrogatory. *Higginson v. Bloekley*, 1 Jur. N. S. 1104; 25 L. J. Ch. 74, V. C. K. The exception should adopt the language of the interrogatory. *Woodroffe v.*

*Daniel*, 10 Sim. 243; *Brown v. Keating*, 2 Beav. 581; *Esdaile v. Molyneux*, 1 De G. & Sm. 218, 219.

Exceptions do not lie to an unsworn answer. *Goodwin v. Bishop*, 145 Ill. 421. Under the New Jersey statute, exceptions lie to such an answer if the plaintiff has waived the defendant's oath. *Ryan v. Anglesea R. Co. (N. J.)*, 12 Atl. Rep. 539.

[*or*, to the answer of the above-named defendant A. B. to the bill of complaint of the said plaintiff] filed in this cause on the — day of —.

*Describe the particular passages alleged to be scandalous; as thus :*

\* [*First exception.*] For that the whole of the paragraph of \* 2125 the said bill [*or*, answer] (*here introduce language to identify the paragraph referred to*) is scandalous.

*Second exception.*] For that the passage commencing with the words: "The said person," in the — line, and ending with the words "which he knew," in the — line, of the paragraph of said bill [*or*, answer] (*identify the paragraph*), is scandalous.

In all which particulars this exceptant excepts to the said bill [*or*, answer] as scandalous; and humbly insists that the said scandalous matter ought to be expunged therefrom.

[*Counsel's name.*]

### 3. *Memorandum that scandal has been expunged.*

Scandal expunged, pursuant to order dated the — day of —.<sup>1</sup>

<sup>1</sup> A memorandum in the above form is usually written opposite the expunged passages.

## NOTICE OF MOTIONS.

1. *For an injunction to stay proceedings at Law.*

In Chancery.

[*Title of Cause.*]

Take notice that this honorable Court will be moved, for and on behalf of the plaintiff, on the — day of —, instant [*or, next*], that the defendant —, may be restrained from commencing or prosecuting any action or other proceedings at Law against the plaintiff, for the recovery of the sum of \$ — in the plaintiff's bill mentioned, or for —, or in respect of the matters mentioned in the plaintiff's bill, or any of them, until the further order of this Court.<sup>1</sup> Dated this — day of —, 1857.

A. B.

*Plaintiff's Solicitor.*

To. Mr. — and Mr. —,  
*Solicitors for the defendants.*

2. *For an injunction to stay an action brought against an executor after decree.*

[*Title, &c.*]

Take notice that this honorable Court will be moved, &c.

That —, of —, may be restrained from further proceeding in or prosecuting the action at Law commenced by him in — Court of, &c., against the defendant — as executor of —, the testator in the pleadings of this cause named, for the recovery of a sum of money alleged to be due to him from the estate of the said testator, and from commencing or prosecuting any other action or actions at Law against the said defendant — as an executor as aforesaid. Dated, &c.

<sup>1</sup> In order to obtain an injunction for stay of proceedings at Law, an application must be made to the Court upon affidavit, verifying the facts alleged in the bill, and if the defendant has appeared, upon notice; if not, the application may be made *ex parte*, or leave may be asked for the Court to give notice of motion for a certain day; and if necessary permission

should also be required to serve the notice and copy of the bill upon the attorney for the plaintiff at Law. *Ferguson v. Beavan*, 16 Jur. 1111. If the defendant has appeared, interrogatories for his examination should be filed, and a copy delivered to his solicitor. *Lovell v. Galloway*, 20 L. T. 231, M. R.; see *Wightman v. Whielton*, 5 W. R. 337, M. R.



- \* 3. *For special injunction against commission of waste or other act complained of in bill.* \* 2127

[Title, &c.]

Take notice, &c., &c., that the defendant <sup>1</sup> — and his agents <sup>2</sup> [*workmen and servants*] may be restrained from [*here follows the prayer in the bill*] until the hearing of this cause, or the further order of the Court. Dated, &c.

4. *For the appointment of a Receiver.*

[Title, &c.]

Take notice, &c., &c., that some proper person may be appointed a Receiver of the rents and profits of the estates in the pleadings in this cause mentioned, with the usual directions.<sup>3</sup> Dated, &c.

5. *Notice to next of kin of application for a representative ad litem of a deceased person.*

Whiteaves v. Melville (V. C. W.).

SIR,

We beg to inform you that on — an application will be made in this cause to —, by —, to appoint some person to represent the estate of the late —, deceased; and that unless you, the father and sole next of kin of the deceased, shall then appear and consent to be appointed so to represent the estate of the said intestate, some other person will be appointed.<sup>4</sup>

We remain, &c.,

A. B.,

*Solicitors for the plaintiff.*

6. *By representatives of deceased defendant, to dismiss suit, unless revived against them.*

[Title, &c.]

Take notice, &c., &c., on behalf of A. B., of, &c., and C. D., of, &c., the legal personal representatives of the late defendant E. F., now deceased, that the plaintiff may be ordered, within one month, to obtain and serve on them an order to revive this suit; or, in default thereof, \* that the plaintiff's bill may stand dismissed. *If there* \* 2128 *are surviving defendants, add:* as against the said A. B. and C. D., for want of prosecution.

<sup>1</sup> *Ante*, Vol. II. p. 1714.

<sup>2</sup> See *Lord Wellesley v. Earl of Mornington*, 11 Beav. 180, 181.

<sup>3</sup> A Receiver will be appointed to collect personal estate in a foreign country, and to get in rents, and also to sell the real estates there, and receive the produce thereof when sold. *Hinton v. Galli*, 24 L. J. Ch. 121, M. R. As to appointing a Receiver of a foreign corpo-

ration in New York, see *Logan v. McCall* Pub. Co. 140 N. Y. 447. A Receiver may also be appointed *after* a decree for sale. *In re Bywater's Estate*, 1 Jur. N. S. 227, V. C. W. And after a decree confirming a sale. *Merrill v. Elam*, 2 Tenn. Ch. 513.

<sup>4</sup> See *Tarratt v. Lloyd*, 2 Jur. N. S. 371: *Tripp's Forms*, 60.

7. *By defendant, to dismiss or stay suit, unless prosecuted by assignee of bankrupt, sole plaintiff.*

[*Title, &c.*]

Take notice, &c., &c., on behalf of the defendant, A. B., that C. D. and E. F., the assignees [*or, that C. D., the official assignee — or, creditors' assignee*] of the estate and effects of the above-named plaintiff, who has been adjudicated a bankrupt, may be ordered within (three weeks) to take proper supplemental proceedings in this suit, for the purpose of prosecuting the same against the said defendant; or in default thereof.

*If before decree*; that the plaintiff's bill may stand dismissed — *if there are other defendants, add*: as against the said defendant — without further order.

*Or, if after decree*; that all further proceedings in this suit — *if there are other defendants, add*: as against the said defendants — may be stayed.

8. *Of filing answer.*

[*Title of cause, &c.*]

Take notice that I have filed the answer of the defendant in this cause.<sup>1</sup> Dated, &c.

Yours, &c.,

A. B.,  
*Defendant's Solicitor.*

9. *Of having filed exceptions.*

Take notice that I have this day filed exceptions for scandal to the plaintiff's bill [*or, to the answer of the defendant A. B.*], in this cause [*or, matter*].

10. *Of having set down exceptions.*

Take notice that I have this day set down for hearing, exceptions for scandal to the plaintiff's bill [*or, to the answer of the defendant A. B.*] in this cause [*or, matter*].

11. *To take evasive answer off the file.*

[*Title, &c.*]

Take notice, &c., &c., that a certain paper writing filed in this cause by the defendant A. B., on the — of —, 18—, and purporting \* 2129 to be \* his answer to the plaintiff's bill of complaint (*or as may be*), may be taken off the file of this Court (*state why*),<sup>2</sup> and that the said defendant may be ordered to pay to the plaintiff his costs occasioned by the said answer, and of this application.

<sup>1</sup> In England, notice must be given in like manner of the entering of any appearance or filing any plea, demurrer, or replication.

<sup>2</sup> See *Lynch v. Lecesne*, 1 Hare, 631; *Brooks v. Purton*, 1 Y. & Coll. C. C. 278; *Reid v. Barton*, 3 Jur. N. S. 263, V. C. W.

12. *To take affidavit off the file for scandal and impertinence.*

Take notice, &c., &c., that the affidavit of (the defendant A. B.) filed on the — day of —, may be taken off the file of this Court, as being scandalous and impertinent; and that (the defendant A. B.), on whose part and behalf the said affidavit was filed, may be ordered to pay the costs of and occasioned by the said affidavit, and the costs of this application.

13. *For leave to amend an answer.*

Take notice, &c., &c., on behalf of the defendant A. B., that the answer filed by him on the — day of —, 18—, to the plaintiff's bill may be amended in the respects following, namely (*state the proposed amendments as thus*: by inserting the name of "John Jones" in the title of the said answer; by substituting the date "1863" for the date "1836" in the fourth paragraph thereof; and by adding thereto the name of —, Esquire, the counsel by whom the said answer was settled and signed).

14. *To discharge an order for irregularity.*

[Title, &c.]

Take notice, &c., &c., that the order made in this cause, bearing date, &c., whereby, &c., may be discharged for *irregularity*, with costs to be taxed by one of the taxing masters of this Court [*or*, by the clerk, *or*, registrar]. Dated, &c.

A. B.,

*Defendant's solicitor.*

15. *For leave to examine witnesses de bene esse.*

[Title, &c.]

That the plaintiff may be at liberty to examine — and — as witnesses for him in this cause *de bene esse*,<sup>1</sup> and that some proper person may be appointed as a special examiner for the purpose of taking such examination. Dated, &c.

\* 16. *Of appointment before Examiner to take cross-examination of deponents in affidavits.* \* 2130

[Title, &c.]

That the Examiner, —, Esq., has appointed the — day of —, at the hour of — o'clock, at his office in —, on behalf of the plaintiff [*or*, defendant], as the case may be, to cross-examine — and —, being the deponents in certain affidavits filed on the part of the said — in this cause; and further take notice that you are required at the like time and place to produce before the Examiner certain letters, dated, &c., and all other letters and copies of letters, books, memoranda,

<sup>1</sup> *Ante*, Vol. I. p. 932; *M'Kenna v. Everitt*, 2 Beav. 189, 191; *Hope v. Hope*, 3 Beav. 317.

papers, and writings in your or either of your possession or power relating to [*the special matter or question in dispute*], and other the matters in question in this cause.<sup>1</sup> Dated, &c.

A. B.,  
*Plaintiff's Solicitor.*

To, &c.

17. *That plaintiff's bill may stand dismissed for want of prosecution.*

[*Title, &c.*]

Take notice, &c., &c., that the bill filed in this cause may stand dismissed out of Court, with costs to be taxed, &c., for want of prosecution. Dated, &c.<sup>2</sup>

To Mr. &c.,  
*Plaintiff's Solicitor.*

18. *By sole plaintiff, to dismiss bill filed without his authority.*

Take notice, &c., &c., on behalf of A. B., the plaintiff named in the bill filed in this cause on the — of —, 18—:

1. That the said bill may be taken off the file of this Court, or dismissed with costs, such bill having been filed without his authority.

2. That the defendants' costs of this suit may be taxed, and that M C. D., the solicitor by whom the said bill was filed, may be ordered to pay such costs to the defendants.

3. That in case he shall neglect so to do, and the plaintiff shall pay such costs, or any part thereof, the said C. D. may be ordered to repay to the plaintiff what he shall so pay, together with such costs as he shall be put to by reason of such non-payment.

\* 2131 \* 4. That the said C. D. may be ordered to pay to the plaintiff his costs of this suit, if any, and of this application; to be taxed as between solicitor and client.

19. *By a co-plaintiff, to strike his name out of bill filed without his authority.*

Take notice, &c., &c., on behalf of A. B., one of the plaintiffs named in the bill filed in this cause on the — day of — 18—, that his name may be struck out of the record of the said bill; such bill having been filed without his authority; and that Mr. C. D., the solicitor by whom the said bill was filed, may be ordered to pay to the said A. B. his costs, if any, of this suit, and his costs of this application; to be taxed as between solicitor and client.

<sup>1</sup> Tripp's Forms, 62. Under the new practice in England, the evidence of all the witnesses is common to all parties to the suit, therefore one defendant may cross-examine the witnesses of another defendant. *Lord v. Colvin*, 3 Drew. 22; 1 Jur. N. S. 298.

<sup>2</sup> *Ante*, Vol. I. p. 801; Tripp's Forms, 62.

20. *Notice of motion for decree.*[*Title, &c.*]

Take notice, that this Court will be moved before, &c., at the expiration of — after the date hereof, or as soon after as counsel can be heard by, &c., of counsel for the plaintiff, that a decree may be made in this cause in accordance with the prayer of the plaintiff's bill.<sup>1</sup> Dated, &c.

Yours, &amp;c.,

A. B.,  
*Plaintiff's Solicitor.*

To —, *the Solicitor for the*  
*above-named defendant.*

The following affidavits will be used in support of such motion: —

The affidavit of, &amp;c.

The affidavit of, &amp;c.

21. *To settle minutes of decree.*[*Title, &c.*]

I shall attend at — o'clock in the — on —, the — instant, at the Registrar's [*or, clerk's*] office to settle the minutes of the decree [*or, order*] in this cause. Dated, &c.

Yours, &amp;c.

A. B.,  
*Plaintiff's Solicitor.*

To Mr. —

*Defendant's Solicitor.*\* 22. *Notice to pass decree.*

\* 2132

[*Title, &c.*]

I shall attend at — o'clock in the — on —, the — instant, at the —'s office, to settle the minutes of [*or, pass*] the decree [*or, order*] in this cause. Dated, &c.

23. *To vacate enrolment of decree.*[*Title, &c.*]

Take notice, &c., &c., that the enrolment of the decree [*or, order*] dated the — day of —, made by his honor, —, may be vacated. Dated, &c.

24. *To suppress depositions.*[*Title, &c.*]

Take notice, &c., &c., that the deposition of A. B., a witness examined in this cause on the part of the defendant before — Examiner, on the — day of — last, be suppressed. Dated, &c.

<sup>1</sup> Tripp's Forms, 63.

25. *For an issue at Law.*

[Title, &amp;c.]

Take notice, &c., &c., that issue at Law may be awarded in this cause for the trial, by jury, of the matters in controversy therein. Dated, &c.

26. *To dissolve injunction.*

[Title, &amp;c.]

Take notice, &c., &c., that the injunction issued in this cause may be dissolved, with costs. Dated, &c.

27. *For order to stay proceedings in original suit.*

A. B.	}	Original bill.
v.		
C. D.	}	Cross-bill.
v.		
A. B.	}	

Take notice, &c., &c., that the proceedings in the original suit commenced by the above A. B. be stayed until the said A. B. shall have put in his answer to the cross-bill, filed against him by C. D. Dated, &c.

Yours, &amp;c.

To, &amp;c.

\* 2133

\* 28. *For an attachment for contempt.*

[Title, &amp;c.]

Take notice, &c., &c., that an attachment as for a contempt be issued against the above defendant, for violating the injunction issued in this cause. Dated, &c.

29. *For hearing.*

[Title, &amp;c.]

Take notice that this cause will be brought to a hearing on bill and answer [*or*, on pleadings and proofs; *or*, on the demurrer filed therein; *or*, on bill, answer, and replication] before —, on the — day of —, at — o'clock, or as soon after as counsel can be heard. Dated, &c.

30. *Notice of hearing on bill and answer.*

(New Hampshire.)

IN THE SUPREME JUDICIAL COURT.

H—, ss.

T. P. v. T. D. &amp; another.

The defendants will take notice that the said cause will be heard on bill and answer at the next law term.

T. P., by  
A. S., his Solicitor.

If the bill is set down by *defendant* for a hearing on bill and answer, the notice on his part should have, underwritten, an affidavit of defendant's solicitor, as follows:—

## IN THE SUPREME JUDICIAL COURT.

H —, ss.

T. P. v. T. D.

I, A. D., solicitor of said defendant, testify and say that the defendant's answer [plea or demurrer] was delivered to the plaintiff's solicitor on the — day of —, 18—, and that — has since elapsed, and no amendment, replication, or exceptions have been delivered to me, or left at my dwelling-house or place of business, by the said plaintiff or his solicitor, or have otherwise come to my hands or knowledge.

A. D.

H — ss. ; —, —, 18—. Personally appeared A. D., and made oath that the above affidavit by him subscribed, is true.

Before me,

A. B., *Justice of the Peace.*

PETITIONS AND MOTIONS.

1. *Petition to take the answer of a defendant without oath.*

[*English Forms.*]

IN Chancery.

Between A. B. . . . . Plaintiff,  
and  
C. D. [and others] . . . . . Defendants.

To the Right Honorable the Master of the Rolls.

The humble petition of the plaintiff —

Showeth,

That your petitioner having filed his bill in this Court against the above-named defendant and others, he is willing to take the answer of the defendant C. D. without oath.

Your petitioner therefore humbly prays, that the said defendant C. D. may be at liberty to put in his answer to your petitioner's said bill without oath [*or*, signature].

And your petitioner shall ever pray, &c.

2. *To amend bill.*

[*Title, &c.*]

Showeth,

That your petitioner having filed his bill in this honorable Court, the defendants have not appeared thereto [*or*, have appeared thereto, and have not yet answered]; and your petitioner is advised to amend his said bill.

Your petitioner therefore humbly prays, that he may be at liberty to amend his said bill, as he shall be advised, without costs, amending the defendants', &c., copies.

And, &c.



\* *Another form of petition for amendment of bill.* \* 2135

(New Hampshire.)

IN THE SUPREME JUDICIAL COURT.

H—, ss.

T. P. v. T. D. & another.

Amendment of bill.

After the words “—,” insert “—.”

To Mr. Justice B.

T. P. prays that the foregoing amendment to his bill may be allowed.  
T. P.

To T. D., T. M. & T. A.

Take notice, that on the — day of — next, the above petition will be presented to Mr. Justice B., at his office in Concord, at eleven o'clock in the forenoon.

T. P., by  
A. S., *his Solicitor.*

—, —, 18—.

3. *To amend bill after answer, but not requiring further answer.*

[*Title, &c.*]

Showeth,

That your petitioner [*or*, petitioners] having exhibited his [*or*, their] bill in this honorable Court against the said defendant R. A. and others, who have all appeared thereto and put in their answers, and that your petitioner [*or*, petitioners] is [*or*, are] advised to amend his [*or*, their] said bill, but he [*or*, they] does [*or*, do] not require any further answer from the defendants.

Your petitioner [*or*, petitioners] therefore humbly prays [*or*, pray], that he [*or*, they] may be at liberty to amend his [*or*, their] said bill, as he [*or*, they] shall be advised, amending the defendants' copies, and requiring no further answer from the said defendants.

4. *To amend bill after answer, requiring further answer.*

[*Title, &c.*]

Showeth,

That your petitioners having exhibited their bill against the above-named defendant W. F. and others, the said defendant W. F. only hath appeared and put in his answer thereto (none of the other defendants having yet appeared to the said bill), since which your petitioners are advised to amend their said bill.

Your petitioners therefore humbly pray, that they may be at liberty \* to amend their said bill, as they shall be advised, on \* 2136 payment of \$— costs to the said defendant W. F. in respect thereof, and without costs as to the other defendants.

And, &c.

5. *To amend a bill by adding a defendant.*[*Title, &c.*]

Showeth,

That your petitioner filed his bill in this honorable Court, against the defendant, on the — day of —, to which the defendant has appeared and put in his answer, upon which your petitioner is advised to make E. F. a party in this cause, and to bring him before the Court as a defendant to the suit.

Your petitioner therefore prays that he may have leave to amend his bill by adding the said E. F., a defendant thereto, with apt words to charge him.

And, &amp;c.

6. *Petition of course for leave to amend an answer by consent.*[*Title, &c.*]

The humble petition of the defendant A. B., sheweth as follows: —

1. The plaintiff lately filed his bill in this cause, against your petitioner; who appeared thereto; and on the — of —, 18—, filed his answer to the said bill.

2. Your petitioner has since discovered the mistakes hereinafter mentioned in his said answer; and desires to correct the same.

Your petitioner therefore humbly prays, that by consent of the plaintiff, his said answer may be amended in the respects following; namely [*state the proposed amendments*].

And, &amp;c.

7. *The like, for leave to file supplemental answer by consent.*[*Title, &c.*]

Showeth, &amp;c.

1. The plaintiff lately filed his bill in this cause, against your petitioner; who appeared thereto; and on the — day of —, 18—, filed his answer to the said bill.

2. Your petitioner has since discovered certain mistakes in his said answer; and desires to explain and correct the same by a supplemental answer.

Your petitioner therefore humbly prays that, by consent of the plaintiff, he may be at liberty on or before the — of —, 18—, \* 2137 to file \* a supplemental answer to the plaintiff's bill, for the purpose of [*state what; as thus; correcting statements inadvertently made in his answer filed on the — of —, 18—, that he had not sold an artificial exhaust elsewhere than at his mill at W.; and as to the number of millstones to which such machinery has been applied*].

8. *Of plaintiff to be admitted to sue in forma pauperis.*

[*Title, &c.*]

Showeth,

That your petitioner having filed his bill in this honorable Court against the said defendant, thereby setting forth, that [*here state concisely the purport of the bill*].

That your petitioner is not worth £5 in all the world, his wearing apparel and the matters in question in this cause only excepted, and he is utterly unable to prosecute his said suit, unless he is admitted to do so *in forma pauperis*.

Your petitioner therefore humbly prays, that he may be admitted to prosecute his said suit *in forma pauperis*, and that Mr. — may be assigned his counsel, and Mr. — his solicitor.

And, &c.

[*Counsel's certificate to be written at the foot of the petition.*]

I humbly conceive that the plaintiff has just cause to be relieved touching the matters of this petition, and for which he has exhibited his bill.

[*Date.*]

[*Counsel's name.*]

9. *Of a defendant to be admitted to defend in forma pauperis.*

[*Title, &c.*]

Showeth,

That your petitioner has been served with a copy of the bill in this cause; that your petitioner is not worth £5 in all the world, his wearing apparel and the subject-matter of this suit only excepted, and by reason of his poverty is unable to make his defence thereto, if not permitted to defend *in forma pauperis*.

Your petitioner therefore humbly prays, that he may be permitted to defend this suit *in forma pauperis*, and that counsel and solicitor may be assigned to him for that purpose.

And, &c.

\* 10. *To assign a guardian ad litem to an infant defendant.* \* 2138

[*Title, &c.*]

Showeth,

That the plaintiff has filed his bill against your petitioner, who has appeared thereto [and is preparing to answer the same]; that your petitioner is an infant under the age of twenty-one years.

That your petitioner is advised that — of —, who is your petitioner's [*state relationship*], is a proper person to be appointed his guardian to defend this suit.

Your petitioner therefore humbly prays, that the said — may be assigned his guardian, by whom he may [answer the plaintiff's bill and] defend this suit.

And, &c.

11. *For the appointment of a guardian ad litem on petition of the plaintiff.*

[*Title, &c.*]

Showeth,

That the bill in this suit was filed against the defendant to foreclose a mortgage executed by the father of said defendant, who is now deceased, in his lifetime, to your petitioner, and praying for a sale of the mortgaged premises; and that the said defendant claims an interest in the said premises as heir-at-law of her father; and the said defendant C. D. resides in the town of —, and is, as the petitioner is informed and believes, an infant under the age of twenty-one years; viz., of the age of fifteen years and upwards. And that on the — day of — process in this cause was duly served on the said C. D. requiring her to appear and answer the said bill, returnable on the — day of —. And your petitioner further shows, that, although more than — days have elapsed since the day of appearance named in said process, no guardian *ad litem* has as yet been appointed for such infant, or applied for by her or by any person on her behalf, to the knowledge or belief of your petitioner.

Your petitioner, therefore, prays that A. H., the clerk of this Court, may be appointed guardian *ad litem* of such infant defendant, to appear and defend this suit in her behalf.

And, &c.

\* 2139 \* 12. *To be admitted to prosecute (or defend), by an administrator.*

(New Hampshire.)

To the Supreme Judicial Court.

H—, ss.

T. P. v. T. D. & a.

J. H., of, &c., says that T. P., the said plaintiff, died intestate, on the — day of —, 1860, and the said J. H. was at a Court of Probate for said county, held at —, on the — day of —, 186—, duly appointed administrator of the estate of said deceased; wherefore he prays that he may be admitted to prosecute this bill.

J. H.

And thereupon it is ordered that the said J. H. be admitted to prosecute said bill.

N. B., Clerk.

13. *For notice to administrator to appear and defend.*

(New Hampshire.)

To the Supreme Judicial Court.

H—, ss.

T. P. v. T. D. & a.

T. P. says that T. D., one of the defendants in this cause, died on or about the — day of —, 186—, and one X. Y. had been since duly

appointed administrator of his estate; wherefore he prays that said X. Y. may be duly notified to appear and defend the said suit.

T. P., by  
A. S., *his Solicitor.*

14. *For leave to make new parties upon the decease of one of the original parties.*

Supreme Judicial Court.

C. G. L. Exeutor *v.* I. T. & als.

The plaintiff suggests that Nathaniel I. Bowditch, trustee under the will of Andrew Thorndike, one of the defendants to this suit, has deceased, and that William I. Bowditch and John Goldsborough have been appointed trustees in his place; and therefore asks leave to amend his bill and make them parties.

F. C. L., *Solicitor.*

\* 15. *By husband and wife.*

\* 2140

(New Hampshire.)

[*Title, &c.*]

G. P., of, &c., and said T. P., say that on the — day of —, 186—, said T. P. was lawfully married to G. P.; wherefore the said G. P. and T. P. pray that they may be admitted jointly to prosecute said bill.

G. P.  
T. P., by  
A. S., *their Solicitor.*

16. *Petition of course, by party late an infant, on coming of age, to dismiss bill with costs, before decree.*

[*Title and address.*]

The humble petition of the plaintiff, late an infant, but now of full age.

Showeth as follows,

1. Your petitioner, when an infant, by C. D., his next friend, filed his bill in this cause against the defendants; to which they appeared; but no decree has yet been made therein.

2. Your petitioner has now attained his age of twenty-one years; and is not desirous to proceed any further in the said cause.

Your petitioner, therefore, humbly prays that his said bill may stand dismissed out of Court; with costs to be paid by him to the said C. D. and to the defendants.

And your petitioner, &c.

17. *For discharge of defendant out of custody of sheriff or messenger.*

(English.)

[*Title, &c.*]

Showeth,

That your petitioner has been taken into custody by the sheriff of — [or, the messenger attending this Court], for not putting in his answer to the plaintiff's bill.

That your petitioner has this day put in his answer to the plaintiff's bill, as by the Record and Writ Clerk's certificate hereunto annexed appears.

Your petitioner therefore humbly prays that he may be discharged from the custody of the said sheriff of — [or, from custody] as touching his said contempt, upon paying or tendering the costs thereof.

\* 2141

\* 18. *To withdraw a plea or demurrer.*[*Title, &c.*]

Showeth,

That the plaintiff having exhibited his bill in this honorable Court against your petitioner, your petitioner put in his plea [or demurrer] thereto, since which your petitioner is advised to make other defence to the said bill.

Your petitioner therefore humbly prays, that he may be at liberty to withdraw his plea [or, demurrer] upon payment of costs.

And, &amp;c.

19. *That a feme covert may answer separate from her husband.*[*Title, &c.*]

The humble petition of —, wife of the defendant —.

Showeth,

That the plaintiff has exhibited his bill in this honorable Court against your petitioner and her said husband [and others], to which your petitioner has appeared.

That your petitioner's said husband is residing at —, out of the jurisdiction of this Court [or, that your petitioner and husband are living separate and apart from each other, or, that the said bill is filed in respect of your petitioner's separate estate and interest in the estates (or, funds) in question in this cause].

Your petitioner therefore humbly prays, that your petitioner may be at liberty to put in her answer to the plaintiff's said bill separate from her husband.

And, &amp;c.

20. *Of a plaintiff for a habeas corpus to bring defendant in custody of sheriff to bar of the Court to answer his contempt for not appearing to or answering plaintiff's bill.*

[*Title, &c.*]

Showeth,

That the plaintiff filed his bill against the defendant —, to which he has not appeared or answered.

That an attachment has issued against him at the instance of your petitioner, upon which he has been arrested and now remains in the custody of the sheriff of — [charged with other detainers].

Your petitioner therefore humbly prays, that a writ of *habeas corpus cum causis* may issue out of this honorable Court, directed to the said sheriff of the county of —, thereby commanding him to bring the \* body of the said — into this honorable Court, on, &c., in \* 2142 order that the said — may answer his said contempt, and be otherwise dealt with, according to law.

And, &c.

21. *To use in original and cross-suits evidence taken in either of them.*

[*Titles of the two suits and address.*]

The humble petition of the plaintiff in the first-mentioned suit [*or, as may be*].

Showeth as follows :

These suits are original and cross-suits, and issue has been joined therein.

Your petitioner therefore humbly prays, that in each of these suits, the plaintiffs and defendants, respectively, may be at liberty to read, at the hearing thereof, the evidence taken in the other of these suits ; saving all just exceptions.

And your petitioner will ever pray, &c.

22. *To enlarge time to answer in cross-suit, till after answer in original suit.*

[*Titles of the two suits and address.*]

The humble petition of the plaintiff in the first-mentioned suit.  
Showeth as follows :

1. These suits are in the nature of original and cross-suits.

2. The bill in the first-mentioned suit was filed by your petitioner on the — day of —, 187— [and on the — day of —, 187— (*if the case be so*), interrogatories were filed for the examination of the defendants in answer to the said bill]. No answer thereto has yet been filed [*or, as may be*].

3. The cross-bill in the second-mentioned suit was filed on the — day of —, 187—, against your petitioner. The plaintiffs therein are respectively defendants to the said bill of your petitioner.

Your petitioner therefore humbly prays, that he may have [*state the number of days or weeks*] time to plead, answer, or demur, not demurring alone, in the second-mentioned suit, after the plaintiffs in that suit shall have put in their answer to the bill in the first-mentioned suit.

And your petitioner will ever pray, &c.

23. *To stay proceedings in original suit till after cross-bill is answered.*

[*Titles of the two suits and address.*]

The humble petition of the plaintiff in the second-mentioned suit.

Showeth as follows :

\* 2143 \* 1. The plaintiffs in the first-mentioned suit, on the — day of —, 187—, filed their original bill against your petitioner ; who appeared and put in his answer thereto.

2. Subsequently to the said answer being sufficient, namely, on the — day of —, 187—, your petitioner filed his cross-bill in the second-mentioned suit against the plaintiffs in the first-mentioned suit, who appeared thereto and on the — day of —, 187—, your petitioner filed interrogatories for their examination in answer to such bill ; but no answer thereto has yet been filed.

Subsequently to the filing of such cross-bill and interrogatories, namely, on the — day of —, 187—, the plaintiffs in the first-mentioned suit obtained an order to amend their said original bill ; and on the — day of —, 187—, they materially amended the same ; and on the — day of —, 187—, they filed interrogatories for the examination of your petitioner in answer to the said amended bill.

Your petitioner therefore humbly prays, that all proceedings in the first-mentioned suit may be stayed until the plaintiffs therein shall have fully answered your petitioner's said cross-bill.

And your petitioner will ever pray, &c.

24. *To change a Solicitor.*

[*Title, &c.*]

Showeth,

That your petitioner employed — of —, as your petitioner's solicitor in this suit, and your petitioner is now desirous to appoint — of — as his solicitor.

Your petitioner therefore humbly prays, that he may be at liberty to change his solicitor accordingly.

25. *To prove exhibits by affidavit at the hearing of a cause.*

[*Title, &c.*]

Showeth,

That this cause being set down to be heard before —, your petitioner is advised that it will be necessary for him to prove, at the hearing thereof, certain letters written by the defendant to — of the following dates, &c., that is to say [*state the dates*].



Your petitioner therefore humbly prays, that he may be at liberty at the hearing of this cause to read an affidavit of, or examine one or more witness or witnesses, *viva voce*, to prove the said defendant's handwriting to the said letters.

\* 26. *For a plaintiff to dismiss his bill with costs.* \* 2144

[*Title, &c.*]

Showeth,

That your petitioner having exhibited his bill in this honorable Court against the above-named defendant, who has appeared [and put in his answer] thereto, your petitioner is now advised to dismiss his said bill.

Your petitioner therefore humbly prays, that the said bill may stand dismissed out of this Court, with costs to be taxed by the proper taxing-master [*or*, by the clerk of this Court].

27. *To enter a decree nunc pro tunc.*

[*Title, &c.*]

Showeth,

That the decree [*or*, order] made in this cause, bearing date, &c., has been drawn up and passed by the registrar, but the time for entering the same, according to the rules of this Court, being elapsed,

Your petitioner humbly prays, that the said decree [*or*, order] may be entered *nunc pro tunc*.

And, &c.

28. *Special petition to rectify a decree or order.*

[*Title and address, to, &c.*]

The humble petition of the plaintiff [*or, as may be*].

Showeth as follows:

1. By the decree [*or*, by an order] made in this cause by [*as the case may be*], dated the — day of —, 18—, it was decreed [*&c. Set out so much of the decree or order as is material to the subject-matter of the petition*].

2. The said decree [*or*, order] has been duly entered in, &c.

3. Since such entry was made, your petitioner has discovered that the said decree [*or*, order] omits to [*state omission required to be rectified*].

Your petitioner therefore humbly prays, that the said decree [*or*, order] may be rectified or corrected by [*state in what respect*] : or that the Court [*or, as may be*] will please to make such other order in the premises as to the Court [*or, as may be*] shall seem meet.

And your petitioner, &c.

\* 2145

\* 29. *To discharge distringas on stock.*

A. B. . . . . Plaintiff,  
 and  
 The Governor and Company of the Bank  
 of England . . . . . Defendants.  
 To, &c.  
 The humble petition of, &c.

Showeth,

That on, &c., a writ of *distringas* was issued at the instance of your petitioner against the defendants to prevent the sale or transfer of £—— [*describe the stock*], standing in the books of the above-named defendants in the name of ——, &c.

That the purpose for which said writ of *distringas* was issued having been satisfied, your petitioner is desirous of having the same discharged.

Your petitioner therefore humbly prays, that the said writ of *distringas* may be discharged accordingly.

30. *For a solicitor to deliver his bill of costs, and that it may be taxed.*

[*Title of cause if there has been any suit, if not, the title should be.*]

“In the matter of ——, one of the solicitors of this Court.”

Showeth,

That your petitioner employed ——, one of the solicitors of this Court, to prosecute this suit [and divers suits at Law], and in other matters, as your petitioner’s solicitor and attorney [*or, if no suit, say, in various matters of business for him*] between the month of ——, 186–, and the month of ——, 186–.

That your petitioner is desirous of obtaining the papers of the said —— belonging to your petitioner, but the said —— refuses to deliver up the same until his bill of costs is paid.

That the said ——, although applied to for that purpose, has not delivered his bill of costs against your petitioner.

Your petitioner therefore humbly prays, that upon your petitioner submitting to pay the said —— what shall appear to be due to him upon taxation of the said bill, that the said —— may be ordered, within —— after notice hereof, to deliver to your petitioner his bill of all such fees and disbursements as he claims to be due to him from your petitioner; and that it may be referred to the taxing-master [*or, clerk*] of this Court, to tax and settle such bill; and that your petitioner and the said —— may produce before the said Master, upon oath, as the said Master shall

direct, all books, papers, and writings in their custody or power  
 \* 2146 respectively relating to such bill, or any of the \* items or charges therein; and that your petitioner and the said —— may be examined upon interrogatories or otherwise touching the same or any of them, as the said Master shall direct; and that all other proper and usual directions may be given. And, &c.

31. *For leave to withdraw replication and amend bill.*

[*Title, &c.*]

Showeth,

That the defendant in this cause has appeared and put in his answer to the bill; and that your petitioner has filed a replication [*or, taken issue on the answer*], but no witnesses have been examined by either party. That since the filing of the replication, your petitioner has been advised, and believes that it is essential to his rights in this cause that his bill should be amended, by adding thereto [*or, inserting therein*] the following statements [*insert new matter proposed*].

And your petitioner further shows, that he had no knowledge of the facts above set forth, nor was he aware of the necessity of introducing them into his bill, until after the said replication was filed [*or, issue was taken on the answer*].

Your petitioner therefore prays that he may be at liberty to withdraw his said replication, and amend his bill as proposed above, or otherwise, as he shall be advised, on payment of costs. And, &c.

32. *Petition to a Justice for a temporary injunction.*

(New Hampshire.)

(To be written on the original bill or a copy.)

In the Supreme Judicial Court.

H—, ss.

T. P. v. T. D. & a.

To Mr. Justice S.

T. P. prays that the injunction sought in the annexed bill may be granted by said justice, the said bill having been duly filed, and the said Court not being in session.

T. P. by

A. S. *his solicitor.*

33. *Petition for an injunction.*

(New Hampshire.)

M—, ss. To the Hon. A. F., one of the Justices of the Supreme Judicial Court.

N. E. C., of, &c., complains against G. C., of, &c., and says she has caused to be filed in the office of the clerk of said Court for said county, \* her libel for divorce against the said G. C., in \* 2147 which she alleges, among other things, that she was married to said G. C. on, &c., at, &c.; that she has resided, and had her home at, &c. [*stating the substance of the charges in the libel*]; that she has had by said G. C. two children, now living, to wit, G. C., aged — years, and L. C., aged — years; that in said libel the petitioner prays

for a divorce and the custody of said children, and for a suitable allowance out of the estate of said G. C. for her support and maintenance and for the support and maintenance of her said children; that the said G. C. is the owner of a house and — acres of land in —, &c., in which house he now resides, of the value of —, &c., and of personal estate, in, &c., of the value of, &c., and he has threatened that if the petitioner should attempt to obtain a divorce from him he would spend all his property, so that she would get none of it for herself or her children; and she believes that, unless he is in some way restrained, he will dispose of all his property, so that, in case an allowance should be made to her, she would be unable to collect it from him.

Wherefore she prays for a writ of injunction, to restrain said G. C. from disposing of, or in any way incumbering, any of his estate, real or personal, until the end of the next law term of said Supreme Judicial Court.<sup>1</sup>

(Signed)

N. E. C.

34. *Petition for an injunction and Receiver, — pending question of Insolvency.*

(Massachusetts.)

G. T. L. *et alii*, Petr's, *v.* G. F. C. *et al.*

And now the petitioners in the above-entitled cause come and move this honorable Court that an injunction be issued by the Court restraining and enjoining B. P. W. and W. R. W., and each of them and their and each of their servants, agents, and attorneys, from making any sale, transfer, conveyance, incumbrance, or disposition of any of the estate, choses in action, property, or effects, real or personal, of the firm of W. & L., or of any of the separate estate of either said B. P. W. or W. R. W., whether consisting of real estate or choses in action, or of any other personal property, and from making any disposal of any of the books of account, papers, documents, vouchers, or evidences of title of either said firm or of said B. P. W. or of said W. R. W.

\* 2148 \* And your petitioners also move this honorable Court to appoint in this cause some suitable and proper person as Receiver of the estates, choses in action, property, and effects, real and personal, of said firm, and as Receiver of the separate estates, real and personal, of said B. P. W. and W. R. W. and G. T. L., respectively, and of all the books of account, papers, vouchers, and evidences of title of said firm, and of said B. P. W. and of said W. R. W. and of said G. T. L., and to decree and order that all said estates, choses in action, property, and effects, real and personal, and said books of account, papers,

<sup>1</sup> Provision is made by statute in Massachusetts for an attachment of the husband's property in certain cases of libel for divorce by

the wife, in order to secure a suitable support and maintenance for her and the children committed to her. Pub. Stats. c. 146, §§ 11, 12, 13.

vouchers, and evidences of title, shall be delivered up into the control and hands of said Receiver.

B. & B.,  
*Atty's and Sol'rs for the*  
*Petitioners.*

35. *Motion by defendant for allowance out of property in hands of Receiver.*

SUFFOLK, SS. }  
In Equity. } SUPREME JUDICIAL COURT, April, 18—.

Between E. S. . . . . Plaintiff,  
and

E. A. . . . . Defendant.

And now before answer the defendant E. A. comes and says that he has delivered to J. K., who has been appointed Receiver in this cause without notice to the defendant, all the cash, books, papers, vouchers, and property in his hands and possession belonging or in any way pertaining to the said partnership business and assets, and amongst other things, cash to the amount of —, and certain promissory notes and due-bills amounting to about the sum of —. And that by reason of the same the defendant is left without means of support, or of employing counsel in this cause; wherefore he prays the Court here, that the said Receiver may be ordered to restore and pay over to the defendant the above sum of money, and the notes and due-bills above mentioned, the same and the proceeds thereof to be accounted for by the defendant on a final settlement of said partnership.

*By M. & C., his Attorneys:*

Defendant's motion for allowance, April 14, 1866, after hearing the same is granted.

R. A. C., *J.S.J. C.*<sup>1</sup>

\* 36. *Motion to modify an injunction with the qualified allowance* \* 2149  
*of the Court thereon.*

Commonwealth of Massachusetts.

S—, ss. Supreme Judicial Court.

At the Rules.

In Equity.

D. S. *v.* H. E. *et al.*

And now the said H. E., one of the defendants in said suit, comes, and before answer to said bill of complaint, and waiving no rights in said suit, moves the Court that the injunction, which has heretofore issued against him in this suit without notice, be so far modified as to allow him, the said H. E., to collect, settle, or adjust the notes or obligations in his hands, as agent of the said Columbia Insurance Company,

<sup>1</sup> Eben Seccomb *v.* Edwin Allyn, Suffolk Co., Mass., Ap. T. S. J. C. 1866.

with the parties liable thereon, and give up the same when so settled or adjusted to such parties liable thereon, and in general that the same may be so modified as to allow him, said H. E., to settle, collect, and reduce to money in such manner as he shall deem proper the notes, obligations, and evidences of debt in his said possession, the proceeds thereof to remain in his hands until further order of this Court, or some justice thereof.

By his Solicitors,  
C. T. & T. H. R.

This motion is so far allowed, that the defendant H. E. is allowed to collect and receive the amount due on notes in his hands and to hold the proceeds under the injunction; but it is disallowed so far as it moves for liberty to compound and compromise said notes.

G. T. B., *J.S.J.C.*

37. *Petition for an attachment for disobeying an injunction.*

(New Hampshire.)

M—, ss.

To the Honorable A. F., one of the Justices of the Supreme Judicial Court.

A. B., of, &c., complains against C. B., of, &c., and says that she is the wife of said C. B., and on the — day of —, 186—, she caused to be filed, in the office of the clerk of said Court for said county, her libel, praying for a divorce from said C. B., and for other relief for the causes therein set forth; and upon her petition a writ of injunction was duly issued by said justice, on the — day of —, enjoining and prohibiting said C. B. from imposing any restraint upon her personal liberty during the pendency of said libel; which was duly served upon said C. B. on the — day of —.

\* 2150      \* Yet the said C. B., well knowing the premises, but wholly regardless of the said injunction, on, &c., at, &c., with force and arms made an assault upon the said A. B., and beat and bruised her, and imprisoned and deprived her of her personal liberty for the space of — days, from said, &c., to &c., in contempt of said injunction and against the peace and dignity of the State.

Wherefore she prays that the said C. B. may be held to answer for said contempt, and that justice may be done in the premises.

(Signed)      A. B.

M—, ss., —, 186—. A. B. personally appeared and made oath that the above complaint, by her subscribed, is in her belief true.

Before me,

N. B., *Justice of the Peace.*

38. *Another form of prayer in a petition for an attachment for breach of an injunction.*

Wherefore the plaintiffs pray that your honor will, in consideration of the breach of said injunction, issue a writ of attachment against said

defendant, and order that the said defendant stand committed to the common jail at — in and for said county of — until he pay to the plaintiffs the amount of damages they have sustained in consequence of the taking down of said lime-kiln and machinery, and the removing of the same, together with all the costs and expenses of the plaintiffs in procuring said application and writ of attachment, together with such fine as to your honor shall seem meet.<sup>1</sup>

39. *Writ of attachment for contempt.*<sup>2</sup>

[*Seal.*]

(State of Maine.<sup>3</sup>)

To the sheriffs of our counties and their deputies

We command you to attach the body of A. B., of —, in our county of —, so that you have him before our Supreme Judicial Court, next to be holden at —, within and for our county of —, on the — Tuesday of — next, to answer for an alleged contempt in not [*here \* assert the cause*], and you may take a bond with sufficient \* 2151 sureties, to C. D., the party injured, in the sum of —, conditioned, that he then and there appear and abide the order of the Court. Hereof fail not and make due return thereof and of your proceedings, at the time and place aforesaid. Witness E. S., Justice of our said Court, the — day of —, in the year of our Lord, 18—.

— —, *Clerk.*

When the party is not bailable, that part of the writ is to be omitted.

40. *Order for an attachment, &c., for breach of an injunction.*

(Vermont.)

G. H.  
v.  
H. W. } In Chancery — W— Co.

Upon the petition of said H., filed in said Court on the — day of —, A. D. 18—, praying that C. B. E. and W. T., both of R., in said county, might be made to appear before the Chancellor to show cause, if any they had, why they should not be dealt with for contempt in violating the injunction named in said petition; and an order having been made in the premises and duly served; and said E. and T. having ap-

for by the plaintiff to a judge or Court in another county, the writ of injunction is properly made returnable to the county where the bill is pending; and a judge or Court in another county has no jurisdiction of an alleged contempt by disregarding or refusing to obey the injunction. *Androscoggin & Kennebec R. R. Co. v. Androscoggin R. R. Co.*, 49 Maine, 392. In matters of contempt, exceptions may be taken on the question of jurisdiction, where it is distinctly raised and adjudicated upon as matter of Law. 49 Maine, 392.

<sup>1</sup> *Stimpson v. Putnam*, 41 Vt. 240.  
<sup>2</sup> For another form of warrant for the arrest of a party for contempt by breach of an injunction; for form of order in reference to a hearing, taking of testimony, &c., thereupon; form of order for commitment with proviso for bond; form of final decree for damages, costs, and fine; and form of warrant for commitment to enforce the payment of said damages, costs and fine, — see *Stimpson v. Putnam*, 41 Vt. 238, 241-244.

<sup>3</sup> Where a bill in Equity is pending in one county, in Maine, and an injunction is applied

peared in compliance therewith, by themselves and their solicitor, and the matter of said petition having been fully heard and considered,— It is adjudged that said E. and T. are guilty of contempt of said Court, by taking and removing said library from the office and possession of said H., contrary to the order and injunction of said Court; and that such misconduct was calculated to, and did, impair and prejudice the rights of said H., as set forth in said petition. Wherefore, it is adjudged and ordered that the said E. and T., and each of them, be attached of their body, and they, and each of them, be thereupon committed to the county jail, in the town of Newfane, in said county of W., and be therein confined and imprisoned till discharged by the order of the Court, and pay the costs of this petition and the proceedings thereupon; and that process to that end be duly issued by the clerk of said Court, unless the said E. and T. shall forthwith and within — days from and after the day on which notice of this order shall be served on them, return and restore said library to the possession of said H., in the place and condition from which it was taken by them as aforesaid; and that this order be filed in the cause by said clerk, and notice of the same be given to the said E. and T. by delivering to each a true copy hereof, certified by said clerk to be a true copy, under the seal of said Court, the giving of said notice to be certified upon this order by the oath of the person by whom said copies shall be delivered as aforesaid.

Dated this — day of — A. D. 18—.

J. B., *Chancellor.*

\* 2152      \* 41. *For leave to file a bill of review on the ground of the discovery of new facts.*

[*Title, &c.*]

Showeth,

That your petitioner has exhibited his bill in this honorable Court against X. Y., for the purpose of [*state general object of original bill*], and praying [*state the prayer*].

That the said X. Y., being duly served with process, appeared to the said bill and put in his answer. And the said cause being at issue, was brought to a hearing before —, on, &c., whereupon a decree was made in effect as follows: [*set forth the substance of the decree.*]

That said decree has since been duly enrolled [*or, entered of record and judgment thereon rendered*]. And your petitioner further sheweth, that since the time of making and entering said decree, your petitioner has discovered new matters important and material in the said cause; particularly [*here set forth the new matters*], which new matters your petitioner did not know, and could not, by reasonable diligence, have known, so as to make use thereof in the said cause, before and at the time of making and entering the said decree.

Your petitioner, therefore, humbly prays, that he may have leave to file a bill of review against the said C. D. for the purpose of obtaining a review and reversal of the said decree; and that all further proceedings under the same may be stayed. And, &c.



42. *Petition for leave to file an information in the nature of a quo warranto, and for an injunction forbidding the exercise of the right, &c., of certain offices.*<sup>1</sup>

To the Honorable, &c.

Humbly show your petitioners, the President, Directors, and Co., of the L. Bank, that by an act of the legislature of the Commonwealth of M., approved on the — day of —, A. H., E. B., F. K., and their associates and successors, were incorporated by the name of the President, Directors, and Company of the L. Bank, to be located in E. C. in the County of M., being a part of the city of C.; that afterwards at a meeting of the petitioners for said act, called and notified in the manner provided by law, and held on the — day of —, current, the corporation created by said act was legally organized, and A. H., L. H., &c., &c., were duly chosen directors thereof. And thereafterwards, on the — day of —, the said board of directors elected L. H. president of said bank.

\* And so your petitioners aver, that they are a corporation \*2153 legally established and organized, and have a right to hold and exercise and enjoy the franchise, powers, and privileges granted by said act of incorporation, undisturbed, and without molestation, interference, or intrusion, and no persons other than the above-named A. H., L. H., &c., &c., have any right in law to hold or exercise the office of directors of said corporation. And no person other than the said L. H. has any right in law to hold or exercise the office of president of said corporation.

And your petitioners further represent, that E. B. and J. M. D., &c., &c., have illegally and against the right of the petitioners, intruded themselves into the office of directors of said L. Bank, and have assumed to hold and exercise, and still do hold and exercise, the rights, powers, and duties of directors of said bank, claiming the right to do so under the act of incorporation aforesaid.

And the said E. B. has intruded himself into the office of president of said bank, and has assumed to hold and exercise, and still does hold and exercise, the rights, powers, and duties of president of said bank. And the said E. B., as president, and the said J. M. D., &c., &c., as directors, have, and still do, without right, exercise and enjoy the franchise granted by said act of incorporation. Whereby the private right and interest of your petitioners and of the directors and members of said incorporation are injured and put in hazard.

Wherefore your petitioners pray for leave to file an information in the nature of a *quo warranto*, in which the above-named E. B., J. M. D., &c., &c., may be called upon to show by what right they have intruded themselves into the office of directors of said L. Bank, and exercise and claim to exercise the rights, powers, and duties of that office, and the said E. B. may be called upon to show by what right he has intruded himself into the office of president of said bank, and claims to exercise

<sup>1</sup> Lechmere Bank v. Boynton, 11 Cush. 369.

the rights, powers, and duties of the said office, and that the said E. B., as president, and the said J. M. D., &c., &c., as directors, may be called upon to show by what right they exercise and enjoy the franchise granted by said act of incorporation before mentioned.

And your petitioners further ask, that, until a hearing and final decision on said information shall be had, an injunction may issue against the said E. B., forbidding him from exercising the rights, powers, and duties of president of said bank, and against the said E. B., J. M. D., &c., &c., forbidding them from exercising the rights, powers, and duties of directors of said bank, and from enjoying the franchise granted by the act of incorporation before mentioned and for general relief.

\* 2154 \* 43. *Petition for transfer of a fund to a person becoming entitled on the death of the tenant for life. (English Form.)*

In Chancery.

Lord Chancellor.

Vice Chancellor

[or, the Master of the Rolls.]

Between A. B. . . . . Plaintiff,

and

C. D., E. F., &c. . . . . Defendants.

To the Right Honorable the Lord High Chancellor of Great Britain  
[or, To the Right Honorable the Master of the Rolls].

The humble petition of the above-named plaintiff [or, of the defendant  
—, or, of A. B., of, &c.].

[*Introductory statements showing the title of the petitioner.*]

That — Bank £3 per cent annuities and £ — reduced annuities are respectively standing in the name of the Accountant-General of this Court on the credit of this cause [to an account entitled “—”], and there is the sum of £ — cash in the bank on the like credit [and to the like account], which sum of cash has accrued in respect of the last [July] dividends on the said bank annuities.

That your petitioner attained his age of twenty-one years on the — day of —, he having been born on the — day of — [as appears by the Chief Clerk's certificate on this cause, dated, &c.], and he thereupon became absolutely entitled to the said funds [or, that the said (*the tenant for life*) died on the — day of —, whereupon your petitioner became absolutely entitled to the said funds].

That £ — is the apportioned sum or amount in respect of the dividend on the said bank annuities for the current half-year expiring on —, which sum is payable to the legal personal representative of the said [*tenant for life*].

Your petitioner therefore humbly prays, that the costs of your peti-

tioner, as between solicitor and client, and the costs of all other proper parties of this application and consequent thereon, may be taxed by the proper taxing master; and that so much of the said £—— Bank £3 per cent annuities, standing in the name of the Accountant-General on the credit of this cause, as with the said £—— cash in the bank on the like credit will raise the said costs when taxed [and the duty payable on the funds in Court], (the amount thereof to be verified by affidavit), [and also the said sum of £——], may be sold.

That the residue of the said bank annuities, and any interest to acerue due on the said annuities previously to the transfer thereof, and \* also the —— reduced annuities standing in the name of \* 2155 the said Accountant-General on the credit of this cause, may be respectively transferred and paid to your petitioner, or that your Lordship [*or*, Honor] will make such further and other order in the premises as the circumstances of the case may require.

44. *Petition of rehearing and appeal. (English Form.)*

[*Title of causes.*]

To the Right Honorable the Lord High Chancellor of Great Britain.

The humble petition of the above-named plaintiff B. E., of, &c. Showeth,

1. That by the decree dated, &c., made by his Honor Vice-Chancellor Kindersley in the first-mentioned cause, it was ordered that, &c.

2. That after the said first-mentioned cause had been set down for hearing, but before the same came on to be heard, the said defendants, the executors and devisees in trust of the will of the said testatrix, and the said S. E. and also J. S., filed a special case in this Court, in which they prayed the opinion of the Court whether the appointment made by the said testatrix A. E., by her said will, &c., was or was not a good and valid disposition in fee-simple of the estate called, &c.

3. That the said special case came on to be heard before his Honor Vice-Chancellor Kindersley, on, &c., and his honor, by a decree or order dated, &c., declared that the appointment purporting to be made by the said testatrix A. E., by her said will, &c., was not a good or valid disposition of the said estate, &c.

4. That the said first-mentioned cause came on for a hearing before his Honor Vice-Chancellor Kindersley, for further directions, together with a petition which had been presented therein to your Lordship by the said J. S., and with the special case.

5. That an order was made by Vice-Chancellor Kindersley, on, &c., whereby it was declared that the testatrix A. E. had not, at the date of her will, any power to appoint by will the estate called, &c.

6. That the said order of his Honor V. C. K., dated, &c., is, as your petitioner is advised and humbly submits, erroneous, and the same ought to be reversed, and the said order of the —— day of ——, so far as it declares that the said testatrix had not, at the date of her will, any power to appoint by will the estate called, &c., and so far

as any other of the directions contained in the said order are or may be inconsistent with the declaration which your petitioner submits ought to have been made with respect to the validity of the said will of the said testatrix A. E. is erroneous, and ought to be reversed.

\* 2156 \* Your petitioner, therefore, humbly prays your Lordship, that the said first-mentioned cause may be reheard before your Lordship for further directions on the Master's general report, and that the said special case in the said second-mentioned cause, and the said petition of the said J. S. may be respectively reheard before your Lordship; and that the said order of the — day of — made by his Honor Vice-Chancellor Kindersley [on hearing the said special case may be reversed, and that the said order of the said Vice-Chancellor, dated, &c., made on the rehearing the said special case and hearing the said first-mentioned cause for further directions on the Master's report, and the said petition of the said J. S.], may be reversed or varied, and that it may be declared that the said will of the said testatrix A. E., dated, &c., was a due exercise of the power of appointment reserved to the said testatrix in respect of the said estate, &c., and that such directions in the said order of, &c., as are inconsistent with these declarations, may be reversed or varied so as to give effect to such declarations respectively [and that the said petition of the said J. S. may be dismissed], or that the said order may be altered or varied in such manner, or that such other order may be made as to your Lordship may seem meet, and the circumstances of the case may require. And, &c.

We humbly conceive that the special case and petition in the above petition mentioned and referred to, and the first-mentioned cause touching the matters in this petition mentioned, are respectively proper to be reheard before your Lordship, if your Lordship shall think fit.<sup>1</sup>

[*Names of Counsel.*]

A. B.

C. D.

<sup>1</sup> Tripp's Forms, 82, 83, and notes. By Chancery Rule 110 in New Jersey, every petition for a rehearing shall set out concisely the special matter or cause on which such re-

hearing is applied for, and shall be signed by two counsel, except in cases submitted without argument, when it shall be sufficient if signed by one counsel. 15 N. J. Eq. 535.

AFFIDAVITS.

1. *General form.*

(English.)

IN Chancery.

Between A. B. . . . . Plaintiff,  
and  
C. D., and E. F. . . . . Defendants.

I, G. H., of, &c. [*place of residence, and description or addition, or I, A. B., the above-named plaintiff*], make oath and say as follows [*or, if more than one deponent, we, G. H., of, &c., and I. J., of, &c., severally make oath and say as follows*]:

1. I, the deponent, G. H., say, &c.
2. I, the deponent, I. J., say, &c.

The facts and circumstances deposed to by me in the — paragraphs of this affidavit are true and within my own personal knowledge.

The facts and circumstances deposed to by me in the — paragraphs of this affidavit are believed by me to be true, from information which I have received from —.

Sworn, &c.

[*See forms of jurats.*]

*Another general form.*

In Chancery [*or Equity*].

Before the —.

A. B. { State [*or, Commonwealth*] of —, }  
r. { — County: } ss.: I, X. Y., of —,  
C. D. {

in said county, merchant, being duly sworn, depose and say, that at, &c.

And further this deponent saith not.

X. Y.

Sworn to [*or, affirmed*] before me this

— day of —, 1865.

L. M., *Justice of the peace.*

2. *Affirmation by a Quaker or Moravian.*

I, A. B., of, &c., being one of the people called Quakers, make solemn affirmation and say as follows:—

I, this affirmant, &c.

\* 2158

\* 3. *Affirmation by other persons.*

I, A. B., of, &c., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful [*or, in Massachusetts, that I have conscientious scruples against taking any oath*]; and I do also solemnly, sincerely, and truly affirm and declare, &c.

*Joint affidavit and affirmation.*

In Chancery.

[*Title of cause or matter.*]

I, A. B., of, &c., make oath and say, and I, C. D., of, &c., being one of the people called Quakers [*or, having conscientious scruples against taking any oath, or, as the case may be*], do solemnly, sincerely, and truly affirm and declare [*or as may be*] as follows:—

And first, I, the said A. B., for myself, say, —

1.

2.

And I, the said C. D., for myself, say, —

3.

4.

A. B. } Sworn by the said A. B., and affirmed by the said C. D.,  
C. D. } &c., at — [*state where and when*], before me, &c.

4. *Common affidavit to be annexed to a bill in interpleader suit.*

[*Title, &c.*]

I, —, the above-named plaintiff, make oath and say, that the bill in this suit [*or, the bill hereunto annexed*] is not filed by me in collusion with *any* or either of the defendants in the said bill named, but such bill is filed by me of my own accord for relief in this honorable Court.

5. *Affidavit of secretary to public company to be annexed to bill in interpleader suit.*

[*Title, &c.*]

I, H. D., of, &c., make oath and say, that I am the secretary of the — Company, and that I do not, and to the best of my knowledge and belief the said — Company does not, nor do or does any members or member thereof, collude with either of the defendants named in the bill hereunto annexed, but such bill is filed by me, on behalf of the said company, of my own accord, for relief in this honorable Court.<sup>1</sup>

<sup>1</sup> See *Bignold v. Audland*, 11 Sim. 23. If the company is plaintiff, say, “but such bill is filed by the said company of its own accord, for relief,” &c.

- \* 6. *Affidavit of the plaintiff that he has not the deeds in his possession, to annex to a bill before it is filed.* \* 2159

[*Title, &c.*]

I, T. P., the plaintiff in this cause, make oath and say, that I have not, nor to the best of my knowledge, remembrance, or belief ever had, all or any of the deeds, documents, and writings relating to the estate in question in this cause, and mentioned in my bill, exhibited in this honorable Court against the said defendant, nor do I know where the said deeds, documents, and writings, or any of them, now are, unless they are in the custody or power of the above-named defendant.

7. *Affidavit by plaintiff to accompany bill to obtain the benefit of a lost instrument.*

[*Title, &c.*]

I, A. B., of, &c., the above-named plaintiff, make oath and say, as follows:—

1. *State loss of the instrument, as thus:* Some time since, to wit, on or about the — day of —, the [*describe the instrument, as:* promissory note, dated the — day of —] mentioned in the — paragraph of the bill in this cause hereunto annexed [*or, now produced and shown to me, and marked A*], was in my custody or possession; but I have since accidentally lost the same; and I do not know where the said promissory note [*or, as may be*] now is, unless it is in the custody or possession of the above-named defendants, or some or one of them.

8. *Affidavit to obtain order to be admitted to sue or defend a suit, in forma pauperis.*

[*Title, &c.*]

I, A. B., of, &c., the above-named plaintiff [or the above-named defendant], make oath and say, that I am not worth the sum of five pounds in all the world, my just debts being first paid, and my wearing apparel and the matter in question in this cause only excepted.

9. *Affidavit of the service of a notice of motion.*

[*Title, &c.*]

I, Henry Walker, of —, clerk to —, solicitors for the above-named plaintiff, make oath and say, that I did on the — day of —, instant, serve Mr. —, who is solicitor of the above-named defendants [*or, Mr. — and Mr. —, who are solicitors respectively for the above-named defendants, — and —*], with a notice in writing, purporting \* that this honorable Court would be moved before his

Honor —, on the — day of —, then next, or so soon after as counsel could be heard, that, &c. [*here set forth the notice*], by delivering to and leaving with a clerk of the said Mr. —, at his office in —, a true copy of such notice [*or in case there should be more than one solicitor, then add*, and also by delivering and leaving with a clerk of the said Mr. —, at his office in —, a true copy of such notice].

10. *Affidavit of personal service of a bill.*

[*Title, &c.*]

On, &c., I personally served the above-named defendant, —, with a printed bill of complaint, filed in the above cause, at the — office, on, &c., having an indorsement thereon in the form prescribed by —, by delivering to and leaving with the said defendant, —, at —, in the county of —, a printed copy of such bill with such indorsement thereon as aforesaid, which said printed copy was stamped with the proper stamp of — office, indicating the filing of such bill and the date of the filing thereof.

11. *Affidavit of service of an amended bill on the solicitor of the defendant.*

[*Title, &c.*]

On the — day of —, I served Mr. —, the solicitor of the above-named defendant, —, with a printed bill of complaint filed in the above cause in the — office, on the — day of —, as amended on the — day of —, pursuant to an order dated the — day of —, having an indorsement thereon in the form prescribed by —, by delivering to and leaving with the said Mr. — [*or, with a clerk of the said Mr. —*], at his office situate at —, a printed copy of such amended bill, with such indorsement, &c. [*as in last form, and introducing the word "amended"*].

12. *Affidavit of delivery of interrogatories.*

[*Title, &c.*]

On the — day of — I delivered to the above-named defendant, —, a copy of certain interrogatories for the examination of the said defendant, —, by leaving such copy with the said defendant, —, personally [*or, with the wife or servant of the said —, at his dwelling-house*], at —, in the county of —, which said copy of interrogatories was duly stamped and marked as an office copy at the — office, and purported to be a copy of [*or, such of*] the interrogatories filed in this cause on the — day of —, for the examination of the said defendant — [*as the said defendant was required to answer.*]



- \* 13. *Affidavit to obtain order assigning guardian ad litem to an* \* 2161  
*infant defendant.*

[ *Title, &c.* ]

I, —, of —, solicitor for the above-named [*infant*] defendant, —, make oath and say, that the said — is an infant under the age of twenty-one years, and A. B., of —, is the [*state relationship*] of the said infant, and has no interest in the matters in question in this cause adverse to the said —; and the said A. B. is a proper person to be appointed a guardian of the said —, by whom to defend this suit.

14. *Affidavit of tender of costs where defendant taken under attachment or by messenger.*

*Affidavit by solicitor or defendant or his clerk.*

[ *Title, &c.* ]

1. That by an order made in this cause, bearing date the — day of —, it was ordered that the said defendant T. M., upon his paying or tendering the costs of his contempt in, &c., be discharged out of the custody of the sheriff of — [*or, the messenger*], as to his said contempt.

2. I did, on the — day of —, instant, pursuant to such order, tender to Mr. —, who is plaintiff's solicitor in this cause, the sum of \$ —, for the costs of such contempt, but the said Mr. — refused to accept the same or any other sum of money for such costs as aforesaid.

3. I did, on the — day of —, serve the said Mr. — with the said order by delivering to or leaving with his clerk, at the office of the said —, situate at —, a true copy of such order duly passed and entered.

15. *Affidavit as to the correctness of the translation into English of a document in a foreign language.*

[ *Title, &c.* ]

1. I am well acquainted with and in the constant practice of translating the Italian language.

2. The paper writing marked with the letter —, produced and shown to me, this deponent, at the time of swearing this my affidavit, contains a correct and faithful translation into the English language of such parts or pages of the original document in the Italian language as are marked respectively with the letters — and —, also produced and shown to me, this deponent, at the time of swearing this affidavit.

\* 2162 \* 16. *Affidavit as to production of documents pursuant to a decree or order.*

[*Title, &c.*]

I, C. D., the defendant above named, make oath and say, that neither I, this deponent, nor any person or persons, for my use, to my knowledge or belief, or with my privity or consent, have or has, or ever had, in my, his, or their custody or power, any deeds, papers, or writings, or books of account relative to the matters in question in this cause, save and except the several deeds, books of account, papers, and writings mentioned and contained in the schedule hereunto annexed.

*Another form on a different state of facts.*

In Chancery.

[*Title, &c.*]

I, —, of —, make oath and say as follows: —

1. I say I have in my possession or power the documents relating to the matters in question in this suit set forth in [the first or second parts of the] first schedule hereto annexed.

2. I further say, that I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. I further say — [*state upon what grounds the objection is made, and verify the facts so far as may be*].

4. I further say, that I have had, but have not now, in my possession or power, the documents relating to the matters in question in this suit set forth in the second schedule hereto annexed.

5. I further say, that the last-mentioned documents were last in my possession or power on [*state when*].

6. I further say, — [*state what has become of the last-mentioned documents, and in whose possession they now are*].

7. I further say, &c. [*proceed as in next preceding form*].

NOTE. *If the party denies having any, he is to make an affidavit as in the next preceding form, omitting the exception.*

17. *Affidavits of mortgagee, or his attorney, having attended to receive mortgage money certified to be due.*

[*Title, &c.*]

1. I did [under and by virtue of a power of attorney dated, &c., and executed by the said plaintiff, —, and], in pursuance of the Chief Clerk's certificate, bearing date the — day of —, made in this cause on the — day of —, personally attend and wait at the — from before the hour of — of the clock in the forenoon of the said

\* 2163 — day of —, until after the hour of twelve at noon, being the time and place mentioned in the said Chief Clerk's certificate, in order to receive from the above-named defendant A. B. the sum of

\$—— by the said certificate reported due and directed to be paid to me [*or*, to the said plaintiff] for principal, interest, *and costs*, in respect of my [*or*, his] mortgage security in question in this cause, at which time the said defendant A. B. did not, nor did any person or persons on his account or behalf attend or pay to me the said sum of \$——, or any part thereof, nor has he since paid or tendered the same to me [*or*, as I have been informed by the said plaintiff, and verily believe, to the said plaintiff], but the same sum of \$—— still remains due and unsatisfied.

18. *Affidavit to obtain a Ne Exeat.*

In Chancery [*or*, Equity].

Between W. B. R. and others . . . . Plaintiffs,  
and

H. W. H. . . . . Defendant.

Commonwealth of Massachusetts, } ss.: I, W. B. R., one of above-  
County of Suffolk, }  
named plaintiffs, being duly sworn, depose and say that the above defendant is actually and justly indebted to the said plaintiffs in the sum of \$3000,<sup>1</sup> for [*here state the ground and circumstances of indebtedment*]; for the recovery of which the said plaintiffs did, on the —— day of ——, file their bill of complaint in the office of —— for said county of Suffolk, against the said defendant; to which said bill the said defendant has not yet answered; and, being so indebted, the said defendant has lately declared in the presence of each of the plaintiffs, and informed them and this deponent verily believes, that he will without delay leave this Commonwealth and go to live and reside in parts beyond the seas [*or*, in California *or* Texas], out of the jurisdiction of this Court. And this deponent has no doubt, but verily believes, that if the said defendant should be allowed to depart out of this Commonwealth, the plaintiffs' debt will be either entirely lost to them, or the recovery thereof greatly endangered.

Sworn, &c.

W. B. R.

[*Certificate of allowance.*]

\* 19. *Another form of affidavit to obtain a Ne Exeat.*

\* 2164

In Chancery [*or*, Equity].

[*Title, &c.*]

I, A. B., of (*residence*), the above-named plaintiff, make oath and say, as follows:—

<sup>1</sup> The plaintiff to the writ must either be able to swear positively that so much is actually due, or in some other manner to point out to the Court the sum to be marked on the writ. The only exception is in the case of a suit for an account, in which it will

be sufficient, if the plaintiff can swear, that *according to the best of his belief*, any particular sum *at the least* would be found justly due to him upon a balance, if the account were taken. *Ante*, Vol. II. pp. 1702, 1703; *Rice v. Hale*, 5 Cush. 238.

1. *State concisely the institution and object of the suit, as thus:* The bill in this cause was filed by me on the — day of —, 187—, against the above-named defendant, C. D., to obtain an account of all moneys received by the said defendant for or on my account, or for my use, as my agent in the management of my estate called E., in the county of —, as in the said bill mentioned, and of the application of such moneys; and for payment by the said defendant to me of what, on taking such account, should be found due from him to me.

2. *State the existence of a debt due from the defendant as thus:* The two accounts now produced and shown to me, and marked respectively F. and G., have been rendered to me by the said defendant, and purport to be his accounts as such agent as aforesaid. It appears by the said accounts that the said defendant is indebted to me in the sum of —, on balance thereof. I have investigated the said accounts, and I positively say that [*or, to the best of my belief*] the said defendant C. D. is now justly and truly indebted to me in the sum of —, and upwards, on the balance of said accounts [*or as may be*].

3. *Show defendant's intention to go abroad, and deponent's means of knowledge.*

4. From the facts aforesaid, and for the reasons hereinbefore stated, I verily believe that the said defendant C. D., unless he be forthwith apprehended, will depart out of the jurisdiction of this honorable Court; and that the debt due to me as aforesaid from the said defendant will be in danger of being lost to me by the said defendant quitting the said jurisdiction.

Sworn, &c.

## 20. *Affidavit to obtain writ of distringas on stock.*

[*Title, &c.*]

A. B. [the name or names of the party or parties on whose behalf the writ is sued out] *v.* The President, Directors, and Company of the Bank of —.

I, A. B., of —, do solemnly swear, that according to the best of my knowledge, information, and belief, I am [*or if the affidavit is made by a solicitor, C. D., of —, is*] beneficially interested in the stock herein—after particularly described, that is to say [*here specify the*  
\* 2165 \* *amount of the stock to be affected by the writ, and the name or names of the person or persons, or body politic or corporate, in whose name or names the same shall be standing*].

## 21. *Affidavit of waste being committed, to ground an injunction to stay waste.*

[*Title, &c.*]

I, A. B., the above-named plaintiff, make oath and say, that the defendant C. D., in the month of —, 186—, did pull down and destroy part of the dwelling-house and out-buildings at —, of which this depo-

ment is seised in fee-simple, as this deponent is advised and believes, and for the recovery whereof this deponent is proceeding in the Court of —. And this deponent further says, that the said C. D. has felled and cut down several timber and timber-like trees and saplings, not proper to be felled, growing in and upon the lands and grounds belonging to the said mansion-house, and the grounds and premises at, &c., aforesaid, and has carried away such trees, and sold the same to J. H., a ship-builder, at, &c. And this deponent further says, that the said C. D. is now cutting down and felling the trees and thriving timber standing for ornament, shade and shelter, in and about the mansion-house and buildings aforesaid, and in the avenues, walks, &c., belonging thereto; and this deponent further says, that the said C. D. threatens that he will cut down, carry away, and sell all the timber and timber-like trees, ornamental and thriving timber and saplings, standing and growing in and about the said estate, at, &c., aforesaid; and this deponent verily believes that the said C. D. will carry his threats into execution, unless restrained by this honorable Court, to the great loss and damage of this deponent.

A. B.

Sworn, &c.

22. *Affidavit identifying a person named in a certificate of his death or burial.*

[*Title, &c.*]

1. I was well acquainted with A. B., named in the paper writing or certificate marked with the letter D, produced and shown to me at the time of swearing this affidavit.

2. The said A. B. is the same person as A. B., of, &c., named in the certificate of the Chief Clerk of his Honor Vice-Chancellor —, dated,<sup>1</sup> &c.

\*23. *Affidavit verifying the parish register as to the burial of a \*2166 party in a cause and his identity.*

[*Extract from book.*]

1. That the above [*extract*] is a true copy of an entry made in the books kept by the vicar of the parish of, &c., for registering burials in the said parish, so far as the same relates to the burial of the said A. B.

2. I, this deponent, carefully examined and compared the same with the said book.

3. The said A. B. is the same person as A. B. mentioned in, &c., as I know, having been acquainted with the said A. B. in his lifetime.

<sup>1</sup> See Tripp's Forms, 106, note.

24. *Affidavit of the execution of a deed by attesting witness.*

[Title, &amp;c.]

I was present on the — day of —, and saw — sign, seal, and deliver the parchment writing or deed dated, &c., marked with the letter —, produced and shown to me at the time of swearing this my affidavit.

2. The name or signature “—” thereto set and subscribed, as the party executing the said deed, is the proper handwriting of the said —, and the name — set and subscribed as the person witnessing the execution thereof by the said —, is of the proper handwriting of me, this deponent.

25. *Affidavit of execution of deed by a person not a witness to the execution.*

[Title, &amp;c.]

1. I am well acquainted with the handwriting of the defendant F. G. H. [having often seen him write].

2. The indenture dated, &c., and purporting to be made between the said defendant F. G. H., &c., produced to me at the time of making this affidavit, marked with the letter —, was, as I believe, duly executed by the said defendant F. G. H., and the name “F. G. H.” set and subscribed at the foot of said indenture is of the proper handwriting of the defendant F. G. H.

3. I am also well acquainted with the handwriting of J. E. B., of, &c., and I say that the name of “J. E. B.” set and subscribed to the said indenture, as the attesting witness to the execution thereof by the said F. G. H., is the proper handwriting of the said J. E. B.

\* 2167 \* 26. *Affidavit of a witness being of the age of seventy years to obtain order to examine him de bene esse.*

[Title, &amp;c.]

I, A. B., &c., solicitor for the above-named plaintiff in this cause, make oath and say, —

1. That C. D., of, &c., is a very material witness for the said plaintiff in this cause, and that he cannot without the evidence of the said C. D., as I am advised and verily believe, safely proceed to a hearing of this cause.

2. The said C. D. is now of the age of seventy years, as I have been informed by him and verily believe [and he appears to this deponent to be very weak and infirm, and in a declining state of health; on which account, and from his advanced years, he is, in all probability, not likely to live long].<sup>1</sup>

<sup>1</sup> See Tripp's Forms, 61, 108, and notes; *M'Kenna v. Everitt*, 2 Beav. 189, 191. 2150

27. *Affidavit by plaintiff or defendant to obtain an order for a commission or for an Examiner to examine witnesses abroad.*

[*Title, &c.*]

1. This cause is now at issue, and I, this deponent, am desirous of proceeding therein.

2. I have several witnesses to examine in support of the case made by my bill [*or, answer*], who now live and reside at — and — [and particularly A. B., C. D., and E. F.], who can, as I believe, prove the truth of the allegations made in the — paragraphs of my bill [*or, answer*].

3. The several witnesses above named are, as I believe and am advised, material and necessary witnesses for me in this cause, and without their testimony I cannot safely proceed to a hearing; but that with the testimony of those witnesses, I am advised and believe, I shall be able to make a good defence in this cause [*or, can establish my right to relief in this cause*].

28. *Affidavit in support of application to amend bill.*

*Where application is before <sup>2</sup> filing replication.*

1. That the draft of the prepared amendments to the plaintiff's bill has been settled and approved, and signed by counsel.

\* 2. That such amendment is not intended for the purpose of \* 2168 delay or vexation, but because the same is considered to be material for the case of the plaintiff.

*If after <sup>1</sup> replication filed or after the expiration of four weeks from the time when the answer, or the last answer, is deemed sufficient, add, —*

3. That the matter of the proposed amendments is material, and could not, with reasonable diligence, have been sooner introduced into such bill. [*Show also the materiality of the amendments, and state such facts as will enable the Court to judge whether reasonable diligence has been used.*]

29. *Affidavit in support of application for leave to file voluntary answer, after the expiration of the time limited.*

I, A. B., of, &c., the solicitor [*or, managing clerk to Mr. C. D., of, &c., the solicitor*] for the above-named defendant E. F. in this suit, make oath and say as follows: —

1. That the printed bill of complaint [*or, the subpoena*] in this suit was served on the said defendant E. F. on the — day of —, 186—, as I have been informed by the said defendant and verily believe.

2. That I am advised by counsel and believe, that it is material and

<sup>2</sup> *Ante*, Vol. I. p. 415; Tripp's Forms, 183.

<sup>1</sup> *Ante*, Vol. I. p. 415; *Stuart v. Lloyd*, 3 M'N & G. 181.

necessary for the defence of the said defendant E. F. in this suit, that he should put in [a plea, *or*] an answer to the said bill.

3. That instructions to settle such [plea, *or*] answer were laid before counsel on the — day of —.

4. That it is not desired to put in such [plea, *or*] answer for the purpose of delay, and that further time, until the — day of — next will, in my judgment, be necessary to put in such [plea, *or*] answer.

30. *Affidavit that no answer has been delivered, so that a decree may be entered on the bill as confessed.*

(New Hampshire.)

In the Supreme Judicial Court.

H —, ss.

T. P. v. T. D. & another.

I, A. S., solicitor of said plaintiff, testify and say that no plea, answer, or demurrer to the bill of complaint of T. P. v. T. D., T. M., and T. A. has been delivered to me by either of said defendants, or left at my dwelling-house or place of business, or has otherwise come to my hands or knowledge.

A. S.

\* 2169    \* H —, ss. —, —. Personally appeared A. S., and made oath that the above affidavit, by him subscribed, is true.  
Before me, N. B., Clerk.

31. *Affidavit of having discovered new matter for a bill of review.*<sup>1</sup>

[Title, &c.]

I, J. C. P., the defendant, make oath and say, that since the time of pronouncing the decree in this cause, I, the deponent, have discovered new matter of consequence in the said cause, particularly that the plaintiff on, &c., did, &c. [*state the substance of the newly discovered matter*], which I, this deponent, could not possibly know, so as to make use thereof, in my defence, at the time of pronouncing the said decree.

32. *Affidavit by an executor, to obtain order to restrain action after decree.*

[Title, &c.]

1. I have, in the first schedule hereunder written, set forth a true, full, and particular account of all and singular the sum and sums of money received by or come to the hands of me, this deponent, as the executor of T. T., the testator in the pleadings of the cause named, or to the hands of any other person or persons by my order, or for my use.

<sup>1</sup> See affidavit in *Baker v. Whiting*, 1 Story, 218, 220.



2. I have really and *bona fide* paid, as executor of the said testator, the several sums of money mentioned and set forth in the second schedule hereunder written, in discharge or part discharge of the debts of the said testator, and for his funeral expenses.

3. I have *not* any sum or balance whatever on account of the personal estate of the said testator in my possession or power [*or*, I have the balance or sum of \$— and no more, on account of the personal estate of said testator, in my hands].

4. The outstanding personal estate and effects of the said testator consist of the several debts and other particulars, so far as I am enabled to set forth the same, specified in the third schedule hereunder written.

The first schedule referred to by the foregoing affidavit.

The second schedule referred to by the foregoing affidavit.

The third schedule referred to by the foregoing affidavit.

\* 33. *Affidavit verifying Receiver's account.*

\* 2170

In Chancery.

[ *Title, &c.* ]

I, —, of —, the Receiver appointed in this cause, make oath and say as follows:—

1. I say that the account contained, from page — to page —, both inclusive, in each of the two several books marked with the several letters A and B, produced and shown to me at the time of swearing this my affidavit, and purporting to be my account of *the rents and profits of the real estate and of the outstanding personal estate of —, the testator* [*or, intestate*], *in this cause*, from the — day of —, 186—, to the — day of —, 186—, both inclusive, doth contain a true account of all and every sum and sums of money received by me, or by any other person or persons by my order, or to my knowledge or belief, for my use, on account or in respect of the *said rents and profits accrued due on or before the said — day of —,*<sup>1</sup> *or on account or in respect of the said personal estate* other than and except what is included as received in my former account [*or, accounts*] sworn to by me.

2. And I further say, that the several sums of money mentioned in the said account hereby verified to have been paid and allowed, have been actually and truly so paid and allowed for the several purposes in the said account mentioned.

3. And I further say, that the said account is just and true in all and every the items and particulars therein contained, according to the best of my knowledge and belief.

<sup>1</sup> The day to which the account is made up.

OATHS AND JURATS.<sup>1</sup>1. *To bill or answer or affidavit.**Common Form.*]

Commonwealth of Massachusetts, } ss.: On this — day of —,  
Essex County. }

before me personally appeared A. B., and made oath that he has read the above bill [*or, answer or affidavit*], subscribed by him [*or, has heard it read*], and knows the contents thereof, and that the same is true, of his own knowledge, except as to matters which are therein stated to be on his information and belief, and as to those matters he believes them to be true.

J. C. P., *Master in Chancery*  
[*or, Justice of the Peace*].

2. *To the answer of a foreigner.*

On this — day of —, 1865, before me personally appeared A. B., who is a foreigner and unacquainted with the English language, and made oath to the above answer before me by the interpretation of A. H. P. (who was previously appointed and sworn by me to make true interpretation of the same), and thereupon the said A. B. did on his oath aforesaid declare that the matters contained in his said answer are true, &c., &c.

E. L., *Master, &c.*  
[*or, Justice of the Peace*].

3. *The affidavit of the interpreter to be annexed to the answer. The following is the form in 1 Fowler Exch. Pr. 429.*

Between A. B., Plaintiff, }  
and  
C. D., Defendant. }

E. F., of —, in the county of —, gentleman, maketh oath and saith, that he is well acquainted with the French and English

<sup>1</sup> Another form of oath and jurat to an answer by one defendant [*English*]:—

To the defendant: Is that your name and handwriting?

You do swear that so much of this your answer as concerns your own acts and deeds is true to the best of your knowledge, and that so much thereof as concerns the acts and deeds of any other person or persons therein named you believe to be true. So help you God.

A. B. { Sworn [if another defendant joins in the answer, add: by the defendant A. B., at (*state where and when*)] before me, &c.

When all the defendants joining in the same answer are not sworn at the same time, a separate jurat must be written for each occasion on which the oath is administered. Braithwaite's Oaths in Ch. 52, n. (a).

languages, and \* that he hath truly and correctly read over and \* 2172 translated to the defendant the bill filed by the plaintiff in this cause; and this deponent further saith, that he hath read over to the defendant the translation in the French language of the English answer of the said defendant hereunto annexed; and this deponent further saith, that the same is a just and true translation of the English into the French language, which said answer is also hereunto annexed.

Sworn, &c., &c. Before me,

E. F.

M. H., *Master in Chancery.*

#### 4. *To the answer of a corporation.*

The answer of the defendants, the President, Directors, and Company of the Bank of America, was taken this — day of —, in the year —, before me, under the common seal of the said corporation, as by their said seal affixed appears. 2 Fowler, 416, 422.

M. H., *Master in Chancery.*

### ENGLISH FORMS OF JURATS.

#### 5. *Where answer or affidavit sworn at Record and Writ Clerk's Office.*

Sworn [by the defendant A. B., or, by the defendants, or, deponents A. and B.] at the Record and Writ Clerk's Office, Chancery Lane, in the county of Middlesex, this — day of —, 187—, before me, —.

#### 6. *If before a London Commissioner.*

Sworn, &c., at my house [or, Chambers], No. —, Field Court, Gray's Inn, in the County of Middlesex, this — day of —, 187—, before me,

A. B.,

*A London commissioner to administer oaths in Chancery.*

#### 7. *Or if in the country.*

Sworn, &c., before me,

C. D.,

*A commissioner to administer oaths in Chancery in England.*

#### 8. *Ordinary form of oath and jurat; one defendant or deponent.*

*To the defendant or deponent:* Is that your name and handwriting? You do swear that the contents of this your answer [or, affidavit] are true. So help you God.

Sworn, &c. [as above].

\* 2173 \* 9. *The like: two or more defendants or deponents sworn together.*<sup>1</sup>

*To each defendant or deponent:* Is this your name and handwriting?

*To both or all:* You do severally swear that the contents of this your answer [*or, affidavit*] are true. So help you God.

Sworn, &c.

10. *Where the guardian of an infant swears to the answer.*

Sworn, &c., by A. B., the guardian of the infant defendant — —, assigned pursuant to an order dated the — day of —.

11. *Where the defendant or deponent cannot write, but makes his mark.*

Sworn, &c., at, &c., on &c., this answer [*or, affidavit*] having been first read over to the said defendant [*or, deponent*], who appeared perfectly to understand the same, and made his [*or, her*] mark thereto in my presence before me, —.

12. *Oaths and jurat, where a witness reads the answer or affidavit to a marksman.*

*To the witness:* Is that your name and handwriting?

You do swear that you have truly, distinctly, and audibly read over the contents of this answer [*or, affidavit*] to the defendant [*or, deponent*] A. B. [*If any exhibits are referred to in the answer or affidavit, add:* and explained to him the nature and effect of the exhibits therein referred to]; and that he appeared to understand the same, and made his mark to this answer [*or, affidavit*] in your presence. So help you God.

*To the marksman:* Is that your mark?

You do swear that the contents of this your answer [*or, affidavit*] are true. So help you God.

Sworn by the defendant [*or, deponent*] A. B. at [*state where and when*]; C. D., the witness to the mark of the said A. B., having been first sworn that he had truly, distinctly, and audibly read over the contents of this answer [*or, affidavit*] to the defendant [*or, deponent*] A. B. [*If any exhibits are referred to in the answer or affidavit add:* and explained to him

the nature and effect of the exhibits therein referred to]; and \* 2174 the defendant [*or, deponent*] A. B. appeared to understand \* the same, and made his mark to this answer [*or, affidavit*] in the presence of the deponent C. D.; before me, &c.

13. *Oath of a blind defendant or deponent, and jurat, where the officer reads to him the answer or affidavit.*

*To the defendant or deponent:* You do swear that the contents of this your answer [*or, affidavit*] are true. So help you God.

<sup>1</sup> Where all the defendants or deponents are not sworn at the same time, a separate jurat must be written for each occasion on which the oath is administered.

Sworn by the defendant [*or, deponent*] A. B. at [*state where and when*] before me; I having first truly, distinctly, and audibly read over to him the contents of this answer [*or, affidavit*] [*If any exhibits are referred to in the answer or affidavit, add:* and explained to him the nature and effect of the exhibits therein referred to], he being blind; and he appeared to understand the same.

[*Signature and style of office.*]

14. *Oaths and jurat, where a witness reads the answer, or affidavit, to a blind defendant or deponent.*

*To the witness:* Is that your name and handwriting?

You do swear that you have truly, distinctly, and audibly read over the contents of this answer [*or, affidavit*] to the defendant [*or, deponent*] A. B. [*If any exhibits are referred to in the answer or affidavit, add:* and explained to him the nature and effect of the exhibits therein referred to]; and that he appeared to understand the same and signed his name [*or, made his mark*] to this answer [*or, affidavit*] in your presence. So help you God.

*To the blind man:* You do swear that the contents of this your answer [*or, affidavit*] are true. So help you God.

Sworn by the defendant [*or, deponent*] A. B. at [*state where and when*]; C. D., the witness to the signature [*or, mark*] of the defendant [*or, deponent*] A. B. having been first sworn that he had truly, distinctly, and audibly read over the contents of this answer [*or, affidavit*] to the defendant [*or, deponent*] A. B. [*If any exhibits are referred to in the answer or affidavit, add:* and explained to him the nature and effect of the exhibits therein referred to]. he being blind, and the defendant [*or, deponent*] A. B. appeared to understand the same, and signed his name [*or, made his mark*] to this answer [*or affidavit*] in the presence of the deponent C. D., before me, &c.

A. B. of [*residence*].

\* 15. *Ordinary form of oath by a deaf and dumb defendant, or deponent, and jurat.* \* 2175

*To the defendant or deponent:* Is that your name and handwriting?

You do swear that the contents of this your answer [*or, affidavit*] are true. So help you God.

16. *Where a married woman answers separately from her husband.*

Sworn, &c., by, &c., pursuant to an order dated, &c., whereby the said — is at liberty to answer separate from her husband, before me, —.

17. *Oaths and jurat where a foreigner answers or deposes in English, through an interpreter.*

*To the interpreter:*<sup>1</sup> Is that your name and handwriting?<sup>2</sup>

You do swear that you well understand the French language [*or, other language of the foreigner*], and that you have truly, distinctly, and audibly interpreted the contents of this answer [*or, affidavit*] to the defendant [*or, deponent*] A. B.; and that you will truly and faithfully interpret to him the oath about to be administered to him. So help you God.

*To the foreigner, through the interpreter:* Is that your name and handwriting?

You do swear that the contents of this your answer [*or, affidavit*] are true. So help you God.

Sworn at — this — day of, &c., by the defendant  
[*or, deponent*] A. B., through the interpretation of C. D.;  
the said C. D. having been first sworn that he had truly,  
A. B. distinctly, and audibly interpreted the contents of this  
C. D. answer [*or, affidavit*] to the defendant [*or, deponent*]  
of [*residence*].<sup>3</sup> A. B., and that he would truly and faithfully interpret  
to the said A. B. the oath about to be administered to  
him; before me, &c.

18. *Oaths and jurat where the answer or affidavit is in a foreign language; the oath being interpreted to the defendant or deponent.*

*To the interpreter:* Is that your name and handwriting?

You do swear that you well understand the French language [*or, other language of the foreigner*], and that you will truly and faithfully  
\* 2176 fully \* interpret to the defendant [*or, deponent*] A. B. the oath  
about to be administered to him. So help you God.

*To the foreigner through the interpreter:* Is this your name and handwriting?

You do swear that the contents of this your answer [*or, affidavit*] are true. So help you God.

Sworn at — this — day of, &c., by the defendant  
A. B. [*or, deponent*] A. B., through the interpretation of C. D.;  
C. D. the said C. D. having been first sworn that he would  
of [*residence*]. truly and faithfully interpret to the said A. B. the oath  
about to be administered to him; before me, &c.

<sup>1</sup> The interpreter is usually a notary public; but it is not essential that he should be so. See Braithwaite's Oaths in Chan. 58, n. (k).

<sup>2</sup> It seems desirable, but is not, in practice, considered essential, that the interpreter should sign the answer or affidavit. Braithwaite's Pr. 381, n. (a); Braithwaite's Oaths in Ch. 35, n. (k).

<sup>3</sup> If the interpreter does not sign the jurat, his place of residence and addition must be stated in the jurat, immediately after the first occurrence of his name.

19. *Verification of a translation of the answer or affidavit into English, in like case.*<sup>1</sup>

*To the translator:* Is that your name and handwriting?

You do swear that you well understand the French language [*or, other language in which the affidavit is written*], and that the above written is a true translation into the English language of the answer [*or, affidavit*] of A. B. in the French [*or as may be*] language thereunto annexed. So help you God.

C. D. of [*residence, &c. ; as, Cornhill, in the City of London, notary public*], was sworn at — this — day of, &c., that the above written is a true translation into the English language of the answer [*or, affidavit*] of A. B., in the French [*or as may be*] language thereunto annexed; and affixed together at the top thereof under the [notarial] seal of the said C. D., with his name thereto subscribed; before me, &c.

20. *Jurat to answer or affidavit of a Hindoo, interpreted to him in English.*

Subscribed with a seal, and sworn to by the above-named A. B., at [*state when and where*], through the interpretation of C. D.; the said C. D. having been previously sworn that he had first translated and explained to the said A. B., in the Hindostanee language, the contents of this answer [*or, affidavit*]; that the said A. B. perfectly understood the contents of this answer [*or, affidavit*]; that he the said C. D. would truly interpret the oath about to be administered to the said A. B.; and that the seal used by the said A. B. was his own signet, wherewith he always signed documents, according to the custom of his own country; before me, &c.

<sup>1</sup> Where an affidavit is written in a foreign language, a translation into English, verified by a competent person, must be filed with the original. See Braithwaite's Oaths in Ch. 35 n. (h).

SUMMONSES.

1. *Summons for leave to amend bill.*

IN Chancery [*or*, Equity].

Between A. . . . . Plaintiff,  
and

B. . . . . Defendant.

Let all parties concerned attend at, &c., on, &c., at — of the clock, &c., on the hearing of an application on the part of the above-named plaintiff, that he may be at liberty to amend his bill as he shall be advised on or before the — day of — next.

Dated, &c. [*Name of Judge.*]

This summons was taken out by, &c., of, &c., solicitors for the said plaintiff.

To the above-named defendant —.

2. *Summons for further time to answer.*

*Commencement as in preceding.*] An application on the part of the defendant —, that [he] may have one calendar month's [*or*, — week's] further time to plead, answer, or demur, not demurring alone to the plaintiff's bill; and that the costs of this application may be costs in the cause.

[*Conclusion as in preceding.*]

3. *Summons for leave to put in a voluntary answer.*

*Commencement as before in No. 1.*] An application on the part of the defendant —, that [he] may have leave to put in a plea or answer to the plaintiff's bill on or before the — day of — next; and that the costs of this application may be costs in the cause.

[*Conclusion as before.*]

4. *Summons by plaintiff for further time to answer interrogatories filed by the defendant.*

*Commencement as before in No. 1.*] An application on the part of the plaintiff for one calendar month's [*or*, — week's] further time



to answer the interrogatories filed in this cause by the said defendant \*—— for the examination of the said plaintiff; and \* 2178 that the costs of this application be costs in the cause.

[*Conclusion as before.*]

5. *Summons for leave to file exceptions to answer.*

*Commencement as before in No. 1.*] An application on the part of the above-named plaintiff that he may have leave to file exceptions for insufficiency to the answers of the defendants A. B. and C. D. on or before the expiration of —— weeks, from the time when the answer of the defendant E. F. to the plaintiff's amended bill shall have been filed.

[*Conclusion as before.*]

6. *Summons to attend a hearing on reference to a Master.*

In Chancery [*or, Equity*].

Between A. B. . . . . Plaintiff,

and

C. D. . . . . Defendant.

In pursuance of the authority and directions contained in an order of reference, made in the above cause, by [*state the Judge or Court*], I, G. F. C., one of the Masters in Chancery for the [*state the jurisdiction*] [*or, appointed Master for this case*], do hereby summon you, C. D., defendant in the above cause, to appear before me, the said G. F. C., Master as aforesaid, at [*state the place*] on the —— day of ——, to attend a hearing of the matters in reference before me in said cause, to be had by virtue of the said order, and hereof you are not to fail at your peril.

Dated the —— day of ——, in the year of our Lord one thousand eight hundred and ——.

G. F. C., *Master, &c.*

7. *Summons for affidavit and production of documents.*<sup>1</sup>

*Commencement as before in No. 1.*] An application on the part of the above-named —— for an order that the above-named —— do within —— days after the service of the order to be made upon this application, make a full and sufficient affidavit, stating whether he has or has had in his possession or power, any, and if any, what documents relating to the matters in question in this suit, and accounting for the same; and that the said —— do within —— days afterwards produce and leave with the ——, such of the said documents as by such affidavit shall appear to be in his possession or power, except such of the same (if any) as he may by his said affidavit object to produce, with the usual directions.

[*Conclusion as before.*]

<sup>1</sup> See *Iasigi v. Brown*, 1 *Curtis*, 8, 401.

\* 2179 \* 8. *Summons for production of documents admitted by answer.*

*Commencement as before.*] An application on the part of the above-named plaintiff that the above-named defendant may be ordered within — days after the service of the order to be made upon this application, to produce and leave with the —, the documents admitted by his answer in this cause filed the — day of — to be in his possession, and set forth in the schedule thereto, with the usual directions.

[*Conclusion as before.*]

9. *Summons to proceed with accounts, &c., directed by decree or order.*

*Commencement as before.*] An application on the part of the above-named plaintiff to proceed with the accounts and inquiries [and other proceedings] directed by the — made in this cause dated the — day of —, 186—.

[*Conclusion as before.*]

10. *Summons for order for accounting party to leave accounts.*

*Commencement as before.*] An application on the part of the above-named plaintiff [*or*, defendant] that the above-named defendant [*or*, plaintiff] may be ordered, within — days from the service of the order to be made on this application, to leave at the — of — [situate] — an account [*or*, accounts] duly verified by affidavit of [*here insert the words of the decree or order directing the account or accounts to be taken*].

[*Conclusion as before.*]

11. *Summons for order for leave to attend proceedings.*

*Commencement as before.*] An application on the part of J. H. (the heir of J. H., deceased, in the pleadings named), that the said J. H. may be at liberty to attend the proceedings under the decree dated, &c., he undertaking to be bound thereby in the same manner as if he had been originally made a party to this suit.

[*Conclusion as before.*]

12. *Summons to discharge Receiver and vacate recognizance.*

*Commencement as before.*] An application on the part of the above-named plaintiff, that A. B., the person appointed in this cause to receive, &c., be discharged from being such Receiver, and that he do forthwith pass his final account, and pay the balance certified

\* 2180 \* to be due thereon into the —, as directed by the decree in this cause, bearing date the — day of — [*or*, to the plaintiff A. B.], and thereupon that the recognizance, dated, &c., entered into by the said Receiver, and C. D. and E. F., as his sureties, may be vacated,

and that for such purpose the proper officer may be ordered to attend his honor, — with the record of such recognizance.

[*Conclusion as before.*]

13. *Summons to substitute next friend.*

[*Commencement as before.*] An application on the part of the above-named plaintiff, that [upon] A. B., of, &c. [giving security to answer the defendant's costs up to this time, in case the Court shall think fit to award any such security, to be settled by the Judge in case the parties differ], the said A. B. may be substituted as the next friend for the said plaintiff in the place of the above-named C. D.

[*Conclusion as before.*]

14. *Summons to proceed with Receiver's accounts.*

[*Commencement as before.*] An application on the part of A. B., the Receiver appointed in this cause, pursuant to the decree dated the — day of —, and the order dated the — day of —, to pass his — account of rents and profits [and personal estate.]

[*Conclusion as above.*]

# PART III.

## DECREES AND ORDERS.

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### CHAPTER XVII.

#### 1. FORM OF INTRODUCTORY PART OF ORIGINAL DECREE AT THE HEARING OF THE CAUSE. [English Form.]

(a) Lord Chancellor, *or* Lords Justices, *or* Master {                      { Date and  
of the Rolls, *or* Vice-Chancellor Kindersley. }                      { Title.

THIS cause coming on (the — day of —, and) this day to be heard and debated before the Rt. Hon. the Lord High Chancellor of Great Britain [*or*, the Rt. Hon. the Lords Justices, *or*, the Rt. Hon. the Master of the Rolls, *or*, this Court], in the presence of counsel learned for the plaintiff and the defendants [*or if some of the defendants do not appear*, for the plaintiff and the defendants A. and B., no one appearing for the defendants C. and D., although they were duly served with a *subpoena* to hear judgment in this cause, as by the affidavit of, &c., filed the — day of —, appears]; and the pleadings in this cause being opened, upon debate of the matter and hearing [the said affidavit, &c., *enter the evidence*, if any, read, and] what was alleged by the counsel on both sides [*or*, for the plaintiff and the said defendants A. and B.], his Lordship [*or*, their Lordships, *or*, his Honor, *or*, this Court] doth [*or*, do] order and decree [*or*, doth declare<sup>1</sup>], &c.

<sup>1</sup> The Court frequently prefaces its decrees by declarations of matters of fact, or of the right of the parties, and then proceeds to decree the consequent relief. Thus in decrees to execute the trusts of wills relating to real estate, the Court often declares the will to be well proved, and that the same ought to be established and the trusts thereof performed. And so where the Court gives effect to an agreement, or an equitable mortgage, or construes a will or other instrument, or sets an instrument aside, and in other cases. And where a party establishes his right to property, the direction to transfer it to him is often prefaced by a declaration of his title. *Jenour v. Jenour*,

10 Ves. 568; see *Pingree v. Coffin*, 12 Gray. 311. Until recently, it was not the practice of the Court of Chancery in England in ordinary suits to make a declaration of right, except as introductory to relief, which it proceeds to administer. But by a recent statute the Court was empowered, on a special case being stated for its opinion, to make such a declaration of it, without administering any consequent relief; and by a still more recent statute the Court may in any suit "make binding declarations of right without granting consequent relief."

Yet neither under this most recent act, nor otherwise, had the Court power to make a dec-

\* (b.) [Circuit Courts of the United States.]

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Circuit Court of the United States.

In Equity, May term, 1863.

G. I. F. v. W. W. G.

This cause came on to be heard [*or*, to be further heard, as the case may be] at this term, and was argued by counsel; and, thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows viz.:<sup>1</sup>

(c.) *If standing for judgment.*

This Court did order that this cause should stand for judgment; and this cause standing for judgment this day, &c., in the presence of counsel learned for the plaintiff and defendants, this Court doth order [and decree], &c.

(d.) *Where defendant who has not entered an appearance, or a person not on the record appears at the hearing, and submits to be bound.*

And X., by his counsel now appearing, and submitting to be bound by the decree and proceedings in this cause, in the same manner as if he had duly entered an appearance to the plaintiff's bill [*or*, had been originally made a defendant in this cause], and the plaintiff [*or*, all parties] by his [*or*, their] counsel consenting thereto, this Court doth, &c.

laration of right, unless it could, if necessary, act on it by granting consequent relief. *Rooke v. L. Kensington*, 2 K. & J. 753; *Bristow v. Whittemore*, 1 John. 96; see *Baylies v. Payson*, 5 Allen, 473. Neither can the Court make declarations of future rights. *Langdale v. Briggs*, 4 W. R. 703; *Jackson v. Turnley*, 1 Drew. 617; *Hampton v. Holman*, 5 Ch. D. 183; *ante*, p. 1001. Nor merely declare a legal right. *Birkenhead Docks v. Laird*, 4 De G. M. & G. 732.

But, by an Act of Parliament later than those above referred to (22 & 23 Vic. c. 35, § 30), any trustee, executor, or administrator may by petition or summons apply for the opinion, advice, or direction of the Judge respecting the management or administration of the trust property, or the testator's or the intestate's assets, and acting thereon, so far as regards his own responsibility, shall be deemed to have discharged his duty. The practice and mode of proceeding under this Act is regulated by the general order, 20th March, 1860. For

various declaratory decrees, see *Mellick v. President &c. of the Asylum*, Jac. 180; *Hamley v. Gilbert*, Jac. 354; *Colpoys v. Colpoys*, id. 451; *Att.-Gen. v. Dean and Canons of Christ Church*, id. 474; *Mole v. Smith*, id. 490; *Arnold v. Congreve*, 1 Russ. & My. 209; *Barton v. Tallersall*, id. 237; *Campbell v. Graham*, id. 453; *Roberts v. Walker*, id. 752; *Bright v. Rowe*, 3 My. & K. 316; *Yates v. Maddan*, 16 Sim. 619; *Shelton v. Watson*, id. 546.

<sup>1</sup> This is the form prescribed by the 86th U. S. Equity Rule, which also provides that "in drawing up decrees and orders neither the bill nor answer nor other pleadings, nor any part thereof, nor the report of any Master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree or order shall begin in substance," &c. See earlier form of decree in Massachusetts, in which the substance of the bill and of the answer and the facts appearing are set forth. *American Academy of Arts and Sciences v. Harvard College*, 12 Gray, 599, 600, 601.

(a.) [*Date and title.*]

Upon motion this day made unto this Court, by counsel for the plaintiff, and upon hearing counsel for the defendants, this Court doth order (and decree), &c.

(b.) *If standing for judgment.*

This Court did order that the said motion should stand for judgment, and the said motion standing this day on the — for judgment in the presence of counsel for plaintiff and for the defendant, this Court doth, &c.

(c.) *Decree on interlocutory motion treated as motion for decree.*

Upon motion, &c., for [*state shortly the purport of the motion as for injunction or for a Receiver in this cause*], and upon hearing, &c., and the plaintiff and defendants by their counsel respectively consenting [*or, having respectively consented*] that this motion shall be treated as a motion for a decree, this Court, &c.

### 3. DECLARATORY DECREE ON SPECIAL CASE.

[English.]

(a.) [*Date and title.*]

This special case coming on this day to be heard and debated before, &c., in the presence of counsel learned for plaintiff and defendants, upon debate of the matter, and hearing what was alleged by the counsel on both sides [*or, for, &c.*], this Court doth declare that, &c.

(b.) *If the special case stands for judgment.*

This Court ordered that this special case should stand for judgment, and the same standing, &c. [Form (b.) above, on this page.]

(c.) *Declaratory decree on special case; Court declining to answer one of the questions.*

Upon reading the probate of the will of J. M., the testator in the special case named, and hearing what was alleged by counsel on both sides, this Court doth, as to the first of the questions submitted for the opinion of the Court, declare that the defendant H. M. does take \* 2184 under \* the will of the said J. M., the testator, besides the legacy of \$—, and the stock, crops, and farming utensils by the said will specifically bequeathed to him, and a life-interest in the farm situated, &c., such interest as hereinafter mentioned in the residuary estate of the testator. And this Court being of opinion as to the second of the

said questions, that such question cannot properly be decided during the life of the defendant H. M., doth decline to decide the same; And this Court doth, as to the third of the said questions, declare that the said H. M. does take a ratable interest in the residuary estate of the testator in respect of the said legacy of \$—, but not in respect of the stock, crops, &c., by the said will specifically bequeathed to him. 1 Seton Dec. (Eng. ed. 1862) 34.

#### 4. ORDER ON SPECIAL PETITION.

(a.) [*Date and title.*]

Upon the petition of, &c., on the — day of —, preferred unto, &c., and upon hearing counsel for the petitioner [and for, &c., *name the respondents, if any*] and upon reading the said petition, this Court doth, &c.

(b.) *Order on petition as to part adjourned.*

[*Date and title.*]

Upon the petition of, &c., on the — day of —, preferred unto, &c., the further consideration whereof was adjourned by the order dated the — day of —, and upon hearing counsel for the petitioner and for, &c., and upon reading the said order, &c., this Court doth, &c.

#### 5. ORDER ON SPECIAL MOTION.

(a.) [*Date and title.*]

Upon motion this day made unto, &c., by counsel for, &c., and upon hearing counsel for, &c., this Court doth, &c.

(b.) *The like — on cross-motion.*

[*Date and title.*]

Upon motion, &c., by counsel for, &c., that [*recite plaintiff's notice*], and upon motion, &c., by counsel for, &c., that, &c. [*recite the cross-notice*], and upon hearing what was alleged by the counsel on both sides, this Court doth, &c. 1 Seton Dec. (Eng. ed. 1862) 36.

#### \* 6. INTRODUCTORY PART OF ORDER ON CAUSE COMING ON FOR \* 2185 FURTHER CONSIDERATION.

This cause coming on for further consideration thereof, adjourned by the decree [*or, order*], dated, &c., in the presence of counsel for the plaintiff and defendants, upon opening and debate of the matter and hearing the said order and the Master's report, and what was alleged on both sides, this Court doth order, &c. Tripp's Forms (Eng. ed. 1858), 126. See more extended and particular form, 1 Seton Dec. (Eng. ed. 1862) 38.

## 7. USUAL DIRECTIONS.

(a.) *Directions for reference to a Master.*<sup>1</sup>

It is ordered that it be referred to A. B., Esquire, Master, &c., to inquire and state to the Court, &c. And for the better discovery of the matters aforesaid, the parties are to produce before the said Master upon oath all deeds or books, papers, and writings in their custody or power relating thereto, and are to be examined, &c., as the said Master shall direct.<sup>2</sup>

(b.) *Where account directed.*

It is ordered that it be referred to A. B., &c., Master, &c., to take an account, &c. And for the better taking of the said account, and discovery of the matters aforesaid, the parties are to produce, &c., and are to be examined, &c., as the said Master shall direct, who in taking said account is to make unto the parties all just allowances.

(c.) *General adjournment to chambers.*

Let this cause [or matter, or petition, or application] be adjourned for consideration in chambers.

(d.) *Particular reference. Accounts and inquiries.* [Present English Form.]

Let the following accounts and inquiries be taken and made, that is to say, 1. An account, &c.; 2. An inquiry, &c.<sup>3</sup>

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\* (e.) *Liberty to state special circumstances.*

And the Master is to be at liberty to state any special circumstances.

(f.) *Separate report.*

And let the Master be at liberty to make a separate report as to any of the matters aforesaid.

(g.) *Directions to settle conveyances, &c., in case parties differ.*

And the said Master is to settle the said conveyances, in case the parties differ about the same.

(h.) *Further directions.*

And this Court doth reserve the consideration of all further directions, until after the said Master shall have made his report.<sup>1</sup>

<sup>1</sup> For a decree giving specific and detailed instructions to the Master, see *March v. Eastern Railroad*, 43 N. H. 534, 535; and see 2 *Dan. Ch. Pr.* 1221, note.

<sup>2</sup> See *Pingree v. Coffin*, 12 *Gray*, 312; *March v. Eastern Railroad*, 43 N. H. 535; *Simmons v. Jacobs*, 52 *Maine*, 153.

<sup>3</sup> Sometimes inquiries are directed expressly "without prejudice to any question in the cause." *Sharp v. Taylor*, 2 *Phil.* 809.

<sup>1</sup> See *Pingree v. Coffin*, 12 *Gray*, 312, 313.



(i.) *Reservation of interest.*

And the Court doth reserve the consideration of, &c., and of interest until after the said Master shall have made his report.

(j.) *Reserration of costs.*

And this Court doth reserve the consideration of, &c., and of the costs of this suit, until after the said Master shall have made his report.

(k.) *Direction for taxation and payment of costs, &c.*

Let the Master tax all parties their costs in this suit. And it is ordered that such costs, when taxed, be paid as follows; viz., the plaintiffs' costs to Mr. —, their solicitor, &c.

(l.) *Further consideration adjourned; liberty to apply.*

And let the further consideration of this [matter and] cause be adjourned; and any of the parties are to be at liberty to apply (to this Court) as they shall be advised.

(m.) *The like with liberty to apply in chambers as to particular matter.*

And let any of the parties be at liberty to apply in chambers for the appointment of a Receiver [*or for, or as to, &c., as the case may be*], and otherwise (generally) to apply as they may be advised.

\* (n.) *If costs are partly dealt with by the decree.* \* 2187

And let the further consideration of this cause, and of the costs of this cause not hereinbefore otherwise provided for [*or, disposed of*], be adjourned. Liberty to apply. 1 Seton Dec. (Eng. ed. 1862) 56.

(o.) *Payment of money by one party to another.*

Let (the defendant) A., on or before the — day of — (*or, within — days after service of this decree [or, order]*), pay to (the plaintiff) B. the sum of \$—, appearing by, &c. [*or, certified by, &c.*], to be due to him in respect of, &c. [*or, on the taking the accounts directed by, &c.*].

(p.) *Payment of interest to life-tenant or his representatives.*

Let the interest during the life of (the plaintiff) A. to accrue on the, &c., be, from time to time, as the same shall accrue due, paid to (the plaintiff) A. [*and, if so ordered, or to his legal personal representatives*], or until further order.

(q.) *To trustees.*

Let the interest to accrue on, &c., be, from time to time, as the same shall accrue due, paid to the plaintiffs A. B., &c. (or any two of them), upon the trusts of the indenture of the — day of —, until further order.

*(r.) To corporation aggregate.*

Let the interest to accrue on, &c., be, from time to time, as the same shall accrue due, paid to the [*insert the style or title of the corporation*] until further order.

*(s.) Or to the treasurer.*

Let the interest to accrue on, &c., be, from time to time, as the same shall accrue due, paid to A. as the treasurer of [*insert style or title of the corporation*], and to the treasurer for the time being of the said [*corporation*], to be verified by affidavit until further order.

*(t.) To married woman for her separate use.*

Let the interest during the life of A., the wife of B., to accrue on, &c., be, from time to time, as the same shall accrue due, paid to the said A. for her separate use, until further order.

*(u.) To husband in right of his wife.*

Let the interest during the life of A., the wife of B., to accrue on, &c., be, from time to time, as the same shall accrue due, paid to the said B. in right of his said wife, until further order.

## \* 2188 \* 8. TAXATION AND PAYMENT OF COSTS BETWEEN PARTIES.

*(a.) Taxation and payment of costs by one party to another.*

Let the plaintiff (defendant) A. pay to the defendant (plaintiff) B. his costs of this cause (suit) [*or, application*], such costs to be taxed by, &c. (in case the parties differ).

*(b.) Plaintiff to pay one defendant's costs, and recover them with his own from a co-defendant.*

Tax the costs of the defendant A. of this cause (suit); And let the plaintiff B. pay to the defendant A. the amount of the said costs when so taxed. Tax the costs of the plaintiff of this cause (suit); And let what the plaintiff shall pay for the costs of the defendant A. be added to his own costs when so taxed; And let the — certify the total amount thereof; And let the defendant E. pay to the plaintiff B. the amount so to be certified.

*(c.) Costs of application to be costs in the cause.*

And let the costs of the plaintiff [*or petitioner, or defendant, or applicant, or all parties*] of this application be costs in this cause.

*(d.) Petition dismissed with costs.*

This Court doth order that the said petition be dismissed with costs, to be paid by the petitioner A. to the said B. and C. [*name respondents to receive costs*], and taxed by the — (in case the parties differ).

(e.) *Tax and pay costs without prejudice how ultimately to be borne; costs made charge.*

Tax the costs of the plaintiffs and defendants of this cause (suit); and let the plaintiff C. pay to the defendants respectively the amount of their said costs, when taxed, without prejudice to any question how such costs are ultimately to be borne; And let the plaintiffs' costs, and also the costs which the plaintiffs, or any of them, shall so pay to the defendants, be a lien (charge) on the estate of the testator in question in this cause.

(f.) *No costs given on either side.*

The Court doth not think fit to give any costs of this cause [or, application] on either side.

\*(g.) *The like; as to part.*

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And this Court doth not think fit to give any or either side, as to so much of the costs of this cause [or, application] as have been occasioned by, &c. [or, as relate to, &c., or, so far as such costs have been increased by, &c.<sup>1</sup>].

(h.) *Taxation of plaintiff's and defendant's respective costs of parts of suit, involving apportionment of general charges with set-off.*

Tax the costs of the plaintiff in this cause (suit), except so much thereof as relates to the claim set up by him to, &c.; Tax the costs of the defendant, of so much of this cause (suit) as relates to the said claim; And let the Taxing Master set off the said costs of the plaintiff and of the defendant when so respectively taxed, and certify to which of them the balance after such set-off is due; And let such balance be paid by the party from whom to the party to whom the same shall be certified to be due.

(i.) *Direction to like effect.*

Tax the costs of the plaintiff of this suit (cause), except so far as such costs have been occasioned by the plaintiff setting up a claim to the whole of the debt in the bill mentioned. *Hardy v. Hull*, 17 Beav. 355.

(j.) *Taxation of defendant's costs of suit with set-off of part caused by defendant's wrongful claim, including costs of co-defendants; husband and wife; on bill to redeem.*

Tax the costs of the defendant P. (mortgagee) of this cause, except so far as the same relates to the claim made by him in respect of the sum of \$ — charged by the deeds dated, &c., in the bill mentioned, as a sum advanced to the plaintiff and to H. his wife, since deceased, on the occasion of making and executing the said deeds over and above and

<sup>1</sup> See 1 Seton (Eng. ed. 1862), 94, note.

beyond the sum of \$ — secured by the two promissory notes dated, &c., in the bill mentioned; Tax the costs of the defendants, W. and wife, of this cause; And let the plaintiff O. pay unto the defendant W. the costs of the said defendant W. and of his said wife when so taxed; And the, &c., is to inquire and certify how much of such costs of the defendant W. and wife (if any) have been occasioned by (relate to) the defendant P.'s said claim in respect of the said sum of \$ —, and he is also to tax the plaintiff his costs of this cause so far as the same have been occasioned by (relate to) the said claim of the defendant P. in respect of the said sum; And let such costs of the plaintiff when so taxed, together with what he shall have paid to the defendant W.

\* 2190 for \* the costs of the said defendant W., and of his said wife (if any), occasioned by (relating to) the said claim of the defendant P. in respect of the said sum of \$ —, be set off against the said costs of the defendant P. when taxed; And the, &c., is to certify to whom, after such set-off, the balance is due; And let the party from whom such balance shall be certified to be due pay the amount thereof to the other party. *Orange v. Pickford* (1860), 1 Seton Dec. (Eng. ed. 1862) 88.

(k.) *Taxation of costs, except so far as increased by particular claim, not involving apportionment of general charges.*

Tax the costs of the plaintiff (defendant) of this cause (suit), except so far as such costs have been increased by the plaintiff's claim to, &c. [*or*, plaintiff by his bill seeking, &c., *or*, defendant setting up, &c., *or*, claiming, &c.]; Tax the costs of plaintiff (defendant) of this cause (suit) so far only as the same have been increased by the said claim [*or*, the plaintiff by his bill seeking, &c., *or*, by the defendant setting up, &c., *or* claiming, &c.]. Directions for set-off and payment of balance, 1 Seton Dec. (Eng. ed. 1862) 89.

(l.) *Costs up to a particular time.*

Let the plaintiff A. pay to the defendant B. his costs of this cause (suit) up to this hearing [*or* this time, *or* the — day of — (when the defendant offered by, &c., in writing, to pay the amount sought to be recovered by the plaintiff, &c.)]; such costs to be taxed, &c.

(m.) *Costs to be paid by plaintiff and defendant respectively from and to a particular time. — Set-off.*

Tax the costs of the plaintiff G. of the first-mentioned cause, up to the — day of —, the date of the letter from the solicitor for the plaintiff in the second-mentioned cause in his said affidavit referred to; And tax the costs of the defendant L., incurred in the first-mentioned cause since the said — day of —, and also his costs of this application; And let the, &c., set off such costs of the plaintiff G. and of the defendant L., respectively, when so taxed, and certify to whom after such set-off the balance is due; And let the party from whom such balance shall be certified to be due pay the amount thereof to the other party. *Gresham v. Luke* (1860), 1 Seton Dec. (Eng. ed. 1862) 89.

(n.) *Costs of suit taxed, and set off against sum due.*

Tax the plaintiff his costs of this cause, &c.; and let such costs, when taxed, be set off against the sum of \$—, which the plaintiff by his bill admits to be due from him to the defendant under the agreement \* dated, &c., in the bill mentioned, with \$— for interest \* 2191 on the said sum at the rate of \$— per cent per annum, from the — day of — to the — day of —, the date of the filing of the bill, making together \$—; and let the, &c., certify to whom, after setting off the said costs when so taxed against the said sum of \$—, the balance is due; and let the party from whom the balance shall be certified to be due, within — months [*or, days*] after the date of the —'s certificate, pay the amount thereof to the other party. Liberty to apply. *Radley v. Ingram* (1860), 1 Seton Dec. (Eng. ed. 1862) 89.

(o.) *The Master to look into petition and affidavits, and if improper or of unnecessary length, to distinguish and set off costs.*

Direction to take account of what is due to petitioner under certain deeds, and to tax his costs of the application. — “And in taxing such costs, the Taxing Master is to look into the said petition and affidavits, and distinguish such parts thereof as shall appear to him to be (what parts thereof are) (improper, *or*) of unnecessary length; and ascertain the costs, if any, occasioned to the respondents by such part or parts thereof as may be distinguished as being (improper, *or*) of unnecessary length; and let such last-mentioned costs be deducted from the petitioner's costs of this application; and let the balance to be certified,” &c. *Re Radcliffe* (1856), 1 Seton Dec. (Eng. ed 1862) 89, 90.

9. TAXATION OF COSTS AND PAYMENT OUT OF FUNDS IN COURT.

(a.) *Taxation of costs and payment to solicitors. [English Form.]*

Refer it to the Taxing Master to [*or, let the Taxing Master*] tax the costs of the plaintiff and the defendants [*or, all parties*] of this cause (suit). (*If ordered*, as between solicitor and client) [*or if ordered as to executor or trustee only*, the costs of the defendant A., the executor, *or*, trustee of, &c., as between solicitor and client]; and let so much of the £— Bank £3 per cent Anns. standing in the name of the Accountant-General in trust in this cause [the account of, &c.] as with the £— cash in the bank, to the credit of this cause [the like account] will raise such costs when taxed, be sold; And let out of the money to arise by such sale and the said cash, such costs be paid as follows, viz., the costs of the plaintiffs to Mr. —, their solicitor, the costs of the defendant A. to Mr. —, his solicitor, and the costs of defendant B., &c., to Mr. — and Mr. —, his solicitors, or either of them.<sup>1</sup>

<sup>1</sup> See *Frost v. Belmont*, 6 Allen, 164, 165. For a form of decree respecting costs out of the fund, in a creditor's suit, and giving special

and discriminating directions, see *Mason v. Codwise*, 6 John. Ch. 297, 301.

\* 2192. \* (b.) *Taxation of costs of application ; payment out of cash.*

Tax the costs of the petitioner (applicant) and of, &c., of this application [*if so ordered*, and relating thereto, and consequent thereon], [*If so*, as between solicitor and client]; and let such costs, when taxed, be paid out of the \$—— cash in the ——, to the credit of this cause [the account of, &c.] in manner following, &c.

## 10. DECREES BY CONSENT.

This Court, &c., doth by consent order (and decree), &c.

*or,*

And the plaintiff and defendants A. and B. [*or*, all parties] by their counsel consenting to the following decree [*or*, order], this Court doth order (and decree), &c.<sup>1</sup>

## 11. DECREE APPROVING AND CONFIRMING CERTAIN ACTS DONE AND MATTERS AGREED UPON BY THE PARTIES.

(*After reciting the acts done and matters agreed upon, proceed*): It is therefore ordered, adjudged, and decreed, as and for the final decree in this 'cause, that the said statement of the said accounts and of the result of the said accounts, and the payments aforesaid to the said Samuel B. Parsons, and the receipts, releases, and discharges aforesaid, of and by the said Samuel B. Parsons to the said trustees, George Howland, Jr., Matthew Howland, and Edward W. Howland, be, and the same hereby are approved, ratified, and confirmed.

T. M., J. S. J. C.

## 12. RESERVING CASE FOR FULL COURT (MASS.).

(a.) Heard on bill, answer, evidence, and exhibits, and reserved thereon for the consideration [and determination] of the full<sup>2</sup> Court.

*Another Form.*

(b.) Heard on demurrer (to the bill), and reserved for the consideration of the full Court.

## 13. APPEAL (MASS.).

Heard: bill dismissed; plaintiff appeals.

<sup>1</sup> The second form should be used where the order contains several directions, all of which are consented to; in other cases the words "by consent" should preface the particular directions consented to. 1 Seton (Eng. ed. 1862) 21; 2 id. 1120.

<sup>2</sup> "Full Court" is uniformly the language of the Statutes of Massachusetts. Cases are sometimes reserved for the "whole Court;" but it is believed that there is no authority for this in any existing statute of the Commonwealth.

GENERAL SUBJECTS OF EQUITY.

1. ACCOUNT.

(a.) *General account. — Original decree. — Injunction continued. — Judgment to stand as security.*<sup>1</sup>

THIS Court doth order and decree, that it be referred to A. B., Master [*or*, one of the Masters], &c., to take an account of all dealings and transactions between the plaintiff and the defendant; for the better clearing of which account the parties are to produce, &c., as the Master shall direct, who, in taking of the said account, is to make unto the parties all just allowances, and what, upon the balance of the said account, shall appear to be due, from either of the parties to the other of them is to be paid by the party from whom to the party to whom the same shall be reported to be due, within — months after the said Master shall have made his report, and the same shall have been confirmed [*or*, as the said Master shall direct]. And it is further ordered, that the injunction formerly granted in this cause, for stay of the defendant's proceedings at Law, be in the mean time continued and the defendant's judgment is to stand as security for payment of what, if anything, shall appear to be coming to him on the balance of the said account; and the Court doth reserve the consideration of the costs of this suit and of all further directions, until after the said Master shall have made his report, when either side is to be at liberty to apply, &c.<sup>2</sup>

(b.) *Direction for allowing stated account.*

And if in taking the said accounts the said Master shall find that any account has been settled between the said parties, the same is to stand [*or*, not to be disturbed].

(c.) *On bill by part-owner of a ship, for an account.*

This cause coming on, &c., this Court doth order, that an account be taken of all dealings and transactions of the defendant J. M'G., from

<sup>1</sup> The order by which a decree is referred to a Master constitutes the entire basis of his authority. *Simmons v. Jacobs*, 52 Maine, 153; *Gordon v. Hobart*, 2 Story, 260; *Stonington Savings Bank v. Davis*, 15 N. J. Eq. 31, 32; 2 Dan. Ch. Pr. 1221, note.

<sup>2</sup> For an extended form of decretal order

for taking an account, see *Consequa v. Fanning*, 3 John. Ch. 590.

A decree in Equity is to be construed with reference to the issue raised by the prayer for relief and the pleadings. *Graham v. Railroad Co.* 3 Wall. 704.

the first day of October, 1838, in relation to the ship or vessel \* 2194 called \* the "Jane," in the pleadings mentioned, and of all sums which have been received and properly expended by the said defendant in respect thereof, and in taking such account, all just allowances are to be made; and in case it shall appear that any account has been settled between the parties [*or*, the parties interested in the said ship in the plaintiff's bill mentioned], the same is not to be disturbed. And it is ordered that the further consideration of this cause do stand adjourned.

(*d.*) *Decree setting aside stated accounts, and for general account.*

(*Inter alia.*) This Court doth declare that the three stated accounts dated, &c., ought to be opened and set aside, and doth order and decree the same accordingly; and it is hereby referred to A. B., Master, &c., to take a general account of all dealings and transactions between the plaintiffs, or either of them, and the defendant; and also of the value of any timber, &c.; in the taking of which account, the Master is to make unto all parties all just allowances; and for the better taking of said account, &c. And it is ordered and decreed, that what shall be found due upon the balance of the said account from any of the parties to the other, or others of them, be (within, &c.) paid by the party or parties from whom, to the party or parties to whom the same shall be found to be due; and it is ordered and decreed that the said defendant do pay to the plaintiffs their costs of so much of the cause as relates to the setting aside the said stated accounts to be taxed, &c. And the Court doth reserve the consideration of the rest of the costs of this suit until after the said Master shall have made his report, and the said parties are to be at liberty to apply, as, &c.

(*e.*) *Direction for leave to surcharge and falsify.*

But any of the parties are to be at liberty to surcharge and falsify any of the items and charges therein, as they shall be advised.

(*f.*) *Accounts to be conclusive, with leave to show errors.*

Let the accounts, &c., as between, &c., be (considered as) *prima facie* conclusive, but with liberty to either party to show any error therein. *English v. Baring*, penned by Vice-Ch. Kindersley. 1 Seton Dec. (Eng. ed. 1862) 108, 109.

(*g.*) *Release to stand as to sums received, and account stated, — with leave to surcharge and falsify.*

Declare that the indenture of release of the — day of — shall stand only as a discharge for the several sums of money thereby stated to be retained by or paid to the several parties thereto as therein mentioned, and declare that the account in the said indenture mentioned, to be stated, shall stand, with liberty to the plaintiffs and defendants to surcharge and falsify the same. Directions for account. 1 Seton Dec. (Eng. ed. 1862) 108.



\* (h.) *Reference to take account of funds in hands of an agent of a foreign principal, said principal being the defendant, and the funds being claimed in Equity because they could not be come at, to be attached, &c. Agent claims lien for his costs, &c.* \* 2195

Supreme Judicial Court.

SUFFOLK, ss.

March term, 1857.

In Equity.

D. S. . . . . Plaintiff,

v.

The Columbia Ins. Co. *et al.* . . . . Defendants.

Whereas, it has been made to appear to this Court, by the answer of the said defendants or otherwise, that at the time of the service of the *subpœna* and injunction upon the said H. E. in this case, he held in his hands certain funds and promissory notes of the said Columbia Insurance Company, as their agent; and that the said H. E. claims to have a lien thereon for a balance of account claimed by him to be due to him from said company, and also for the reasonable expenses and counsel fees to which he has been subjected in answering to this and other suits against the said company, and other liens:—

This Court doth order, that this cause be referred to G. S. H., Esq., as a Master in Chancery, who, after due notice and hearing of the parties, shall report to this Court what amount of funds and promissory notes or other *choses in action* belonging to said company were at the time of said *subpœna* and injunction, and what now are in the hands or possession of said H. E.; also what balance of account, if any, was due said H. E. from said company at the date of said service; what reasonable sum for counsel fees or other expenses the said H. E. has paid, or is liable to pay or be at, in answering this and other suits now pending against the said company; and also any other claims or demands which the said H. E. may have or may claim to hold as a lien upon said funds or property of said Columbia Insurance Company aforesaid.

By the Court,

April 27. 1857.

G. C. W., Clerk.

(i.) *Order of reference to Master; account; rests; state special circumstances, &c.*

On reading the pleadings in the above cause, and hearing the counsel of the respective parties, and on consideration thereof, it is ordered that it be referred to E. W., Esq., as a Master of this Court, to take an account of the dealings and transactions of and between the said parties under the several agreements set forth in the plaintiff's bill, and to \*state what, upon the balance of said account, shall appear to \*2196 be due from either party to the other.

And the said Master is to make rests in said accounts, and state whether any and what balances were due from either, and which of said parties to the other on the first day of April, A. D. 1850, as well as at the

period at which the plaintiff in his said bill alleges said mutual account to have terminated.

And said Master is authorized to state and report to the Court any special circumstances needful for explaining said account and his report thereof, and the evidence as to the time when said mutual account did terminate.

And for the better taking of said accounts, &c., the parties are required to produce, &c., and to be examined before said Master upon oath, either upon interrogatories or *viva voce*, or by each of said modes as the said Master may direct.

And all equities and further directions are reserved until the coming in of the report.

And the parties are at liberty to apply to the Court as occasion may require. *Foster v. Goddard*, U. S. C. Court, May T., 1857.

By the Court,

H. W. F., Clerk.

(j.) *The like, with order to report facts. — Objections to draft of report to be deemed waived, unless made in a specified time.*

(*Inter alia*.) “7. He will, on request of either party to this proceeding, report to the Court all the facts upon which he shall base his finding, on either of the points or particulars aforesaid.”<sup>1</sup>

*Or thus*: “And if either party so desire, the Master is directed to report any facts found by him (results of evidence, not evidence), pertinent to the matters hereby submitted.”<sup>2</sup>

“8. All objections to the draft of the report not made to the Master within seven days after the same shall be ready for the examination of the parties; and notice thereof given, or within such further time as shall be allowed by the Master, shall be deemed to be waived.”<sup>1</sup>

(a.) *Where will proved.*

This Court doth declare, that the will of —, the testator in the bill [*or*, pleadings] named, dated, &c., is [*or*, and the codicil thereto, dated, &c., are] well proved, and that the same ought to be established, and the trusts thereof performed and carried into execution; and order and decree the same accordingly.

(b.) *Where admitted.*

The defendant H., the heir-at-law of —, the testator in the bill [*or*, pleadings] named, by his answer [*or*, counsel] admitting the due execution of the testator's will, dated, &c. [and of the codicil thereto, dated, &c.], this Court doth declare that the same ought to be estab-

<sup>1</sup> *March v. Eastern Railroad*, 43 N. H. 535.

<sup>2</sup> *Pingree v. Coffin*, 12 Gray, 312, 313.

“And if, in ascertaining said facts, any special

matter shall arise, the Master may state the same to the Court.” *March v. Eastern Railroad*, 43 N. H. 535.

lished, and the trusts thereof performed and carried into execution, and doth order and decree the same accordingly. 1 Seton Dec. (Eng. ed. 1862) 224.

### 3. DEVISE AND APPOINTMENT.

#### (a.) *Devise declared good.*

Establish will. "And declare that the devises and limitations of the estates contained in the said will are good and valid in law." *Thellusson v. Woodford*, 13 Vesey, 207; 1 Seton Dec. (Eng. ed. 1862) 257.

#### (b.) *Declaration that real estate is charged with debts.*

And the testator having by his will charged his real estate with the payment of his debts, this Court doth declare that such debts ought to be made good out of such estate, as equitable assets.<sup>1</sup>

#### (c.) *Declaration that a devise on a double contingency failed.*

This Court doth declare that the testator's daughter S., having died in his lifetime, under twenty-one years of age, but married, the devise over of the two messuages, &c., to the defendant E., her heirs and assigns, in the event of the death of the said S. under twenty-one and unmarried, did not take effect, and the said two messuages descended to the defendant I., the testator's heir-at-law, and that the same are by the said will charged with the testator's debts and funeral expenses. 1 Seton Dec. (Eng. ed. 1862) 257, 258.

#### \* (d.) *Appointments by deed and will held valid.* \* 2198

The Court doth "declare, that the property described and comprised in the indenture of the first of September, A. D. 1843, in the pleadings mentioned, became subject to the trusts therein expressed concerning the same respectively, and that the deed poll of the twenty-second September, A. D. 1843, in, &c., operated as an effectual appointment of the property thereby expressed to be appointed, and that it was not revoked by the will of M. in, &c., but that such will was a good execution of the power of revocation and appointment reserved by the indenture of the first of September, A. D. 1843, and that the same is an effectual appointment of all such parts of the property described and comprised in the indenture of the first of September, A. D. 1843, as were not appointed by the deed poll of the twenty-second September, 1843; And let the trusts of the said will and of the deed poll of the twenty-second September, A. D. 1843, so far as the same operated respectively by way of appointment of any property comprised in the indenture of the first day of September, 1843, be performed and carried into execution." *Directions to execute the trusts, pay costs, and distribute estate.* *Buckell v. Blenkhorn*, 5 Hare, 131; 1 Seton Dec. (Eng. ed. 1862) 259.

<sup>1</sup> For form of a decree in a creditor's suit claiming on a bond, to enforce a trust in the executors to whom the real estate was devised

to be sold for the payment of debts, see *Berg v. Radcliff*, 6 John. Ch. 302, 311.

*(c.) Forfeiture declared.*

And the defendant A., by her counsel, admitting that she never has resided, and does not intend to reside, in the mansion-house situate, &c., the Court doth declare that according to the true construction of the will of G., the testator in, &c., the said defendant has forfeited the estate for life given to her by the said testator's will; and (by consent of the plaintiff by his counsel) doth declare that such forfeiture takes place from this day. *Dunne v. Dunne*, 3 S. & G. 22; 1 Seton Dec. (Eng. ed. 1862) 262.

## 4. DOMICILE AND LEX LOCI.

*Inquiry as to persons entitled, under a gift to heirs, by the law of France.*

And it is ordered [*or, further ordered*] that the said Master do inquire who by the laws of France were the persons interested and described in the will of R., in the pleadings mentioned, as his paternal and maternal heirs, entitled to share in the succession, living at his decease, and whether such persons are living or dead, and if any of them have died, who are or is entitled to their or his personal property.

## \* 2199 \*5. DIRECTIONS TO EXECUTOR TO PAY MORTGAGE OUT OF GENERAL ASSETS; COSTS.

SUFFOLK, SS.

Supreme Judicial Court,  
In Equity.

W. T. A., Executor, v. S. B. and others.<sup>1</sup>

*Decree.*

And now after a full hearing and consideration it is ordered, adjudged, and decreed that the said W. T. A., executor of the will of T. W., take out of the general assets of the estate of said T. W., in his hands as such executor, a sum sufficient to pay the debt with interest thereon, which is secured by mortgage on the estate in D. Street named in the will, and therein specifically devised in trust; and a further sum sufficient to pay the costs of this suit taxed as between solicitor and client, to wit, the sum of two hundred and twenty dollars for the costs of the said executor, the sum of three hundred and eight dollars and seventy-five cents for the costs of the several respondents, S. B. and J. G. B., and the sum of three hundred and ten dollars for the costs of the residuary legatees; and that no part of the said mortgage debt, interest, or costs be paid out of the real or personal estate specifically devised by said will to the said W. T. A. in trust for the benefit of the said S. B. and J. G. B.

By the Court.

December 27, 1862.

G. C. W., Clerk.

<sup>1</sup> *Andrews v. Bishop*, 5 Allen, 490.

# 6. CONSTRUCTION OF WILL, DIRECTIONS TO EXECUTE.

This case came on to be heard and was argued by counsel, and the Court having considered the same do find and declare that the said E. J. is entitled to the household furniture and wearing apparel of the testator, and all his other chattels of personal use, as her own absolute property; that she is entitled to the income, during her widowhood, of all the rest of the personal estate, and that the executor is a trustee by implication to hold the principal, so long as the income is payable to her.

That she is also entitled to the possession and use of the real estate during her widowhood. That the principal of the personal estate, of which the widow is entitled to the income, is intestate estate, the right to which, at the death of the testator, vested in the persons entitled under the Statute of Distributions; that of this, if there were no children, one-half vested in the widow and her interest in the income of \* her share merged in her vested remainder, and it may be paid \* 2200 to her by the executor when his account is settled, and in order of distribution obtained in the Probate Court.

G. C. W., *Clerk.*

February 12, 1862.

# 7. DECREE SETTling THE BASIS AND AMOUNT OF THE PRINCIPAL RESIDUARY FUND OF AN ESTATE; FIXING THE TIME WHEN THE INCOME OF THOSE ENTITLED SHALL BEGIN TO ACCRUE; COSTS AND CHARGES FOR AN AMOUNT AGREED, OUT OF THE PRINCIPAL FUND.

Supreme Judicial Court.

Suffolk, ss.

October Term, 1861.

A. M. K. *et al.* v. W. B. *et al.* In Equity.<sup>1</sup>

And now, after full hearing had of the parties in the above-entitled cause, upon the bill, supplemental bill, and answers, and upon due consideration thereof, it is ordered, adjudged, and decreed by the Court, as follows:—

That the sums received by the defendants B. and G., executors and trustees, as the profits accruing by virtue of the interest of D. M. K. and his legal representatives in the special copartnership of H., B., & T., and the sums received by said defendants as profits upon leases, as set forth in their supplemental answer, amounting in all to one hundred and fourteen thousand three hundred and seven dollars and two cents (\$114,307.02), are not and shall not be accounted for or paid over by them as income of the residue of the estate of said D. M. K., under his will, but that the said sum, together with the sum of fifty thousand dollars, received by said executors, as the capital stock contributed by the said D. M. K. to said copartnership, are, and shall be, treated and accounted for as a part of the principal fund of the residue of said estate.

And it is further ordered, adjudged, and decreed that the plaintiff, and the parties entitled under said will to the income of said residue, shall

<sup>1</sup> Kinmonth v. Brigham, 5 Allen, 270.

be allowed income upon and out of said fund, from the date of the death of said D. M. K., viz., February 22, 1860; that for the purpose of determining the amount of said income, the said residuary fund shall be taken and valued as formed at that date; that each and every sum received by said B. and G., as aforesaid, whether as profits or capital, shall be valued by computing and ascertaining what sum, at interest at six per cent per annum, with annual rests, from February \* 2201 \* 22, 1860, would amount to the sum actually received at the time when it was received; that the amount of such valuation shall be deemed and accounted for as part of the principal residuary fund, and the amount of interest thereon, from February 22, 1860, up to the date of the receipt of such sum by the defendants, computed as above, shall be deemed accounted for, and paid over as income to the parties severally entitled to the income of said residue under said will. And that from and after the dates of the said several payments to said defendants, the income thereof actually realized by the defendants, from the investment of said sums, valued as above ordered, shall be accounted for and paid over as income to the several parties entitled thereto under said will.

And it being agreed by the counsel in said cause that the several sums received, as aforesaid, by the defendants, and the dates at which the same were received, and the valuation thereof made up, as aforesaid, as of February 22, 1860, are as follows, viz. : —

		Sums Received.		Valued as of Feb. 22, 1860.
1860.	August 18 . . .	\$21,090.48	. . . . .	\$20,489.22
1861.	February 15 . . .	18,688.76	. . . . .	17,650.33
1861.	December 31 . . .	24,861.85	. . . . .	22,308.51
1862.	April 26 . . . .	29,447.61	. . . . .	25,931.51
1862.	September 10 . .	70,307.02	. . . . .	60,495.00
		<u>\$164,307.02</u>		<u>\$146,874.57</u>

Now, it is further ordered, adjudged, and decreed that the whole amount to be treated and accounted for by said B. and G., as the principal residuary fund, out of their receipts from the capital and profits of said copartnership, and the profits on said leases, is the said sum of one hundred and forty-six thousand eight hundred seventy-four  $\frac{57}{100}$  dollars (\$146,874.57); and that the whole amount to be paid over or accounted for by them, as income out of their said receipts, is the sum of seventeen thousand four hundred thirty-two  $\frac{45}{100}$  dollars (\$17,432.45); and that said amount be severally accounted for or paid over, as aforesaid, and that the income actually realized by said B. and G., upon said several sums, amounting to \$146,874.57, from and after the receipt and investment thereof by them, be accounted for by them as income of said residuary estate.

And it is further ordered, adjudged, and decreed that the costs and charges of this suit, including the fees of counsel of the several parties thereto, amounting in all, as agreed by counsel in the cause, to two thousand two hundred and twenty  $\frac{2}{100}$  dollars, be paid by said B. and

G., out of the principal fund of said residuary estate in their hands, and be charged to said estate.

By the Court,

November 29, 1862.

G. C. W., *Clerk*.

\* S. DECREE DECLARING THE RIGHTS OF PARTIES UNDER A \* 2202  
WILL AND ORDER OF REFERENCE; FURTHER CONSID-  
ERATION RESERVED UNTIL, &c.

Bristol, ss.

Supreme Judicial Court.

G. H., Jr., *et al.*, in Equity, v. E. W. H. *et al.*

This cause came on to be heard at the term of this Court held at T. within the county of B., and for the counties of B., P., B., and D. county, in the year 1858, upon the bill and answers of those of the defendants who were of full age, and upon the bill and answers by guardian *ad litem*, and the Master's report as to those of the defendants who were minors, and was argued by counsel and was continued for advisement. And after due consideration this Court is of the opinion and doth accordingly declare, that each and every grandchild, if any, of the testator, G. H., who was or shall be born after the sixteenth day of March, in the year 1857, the time of the filing of the bill, is not and will not be entitled to the legacy of five thousand dollars provided in and by the will of the said testator for each and every of his grandchildren, but is excluded utterly therefrom.

And it is further declared, that the defendant S. B. P., as the administrator and next of kin of his minor son J. B. P., deceased, is entitled to have and recover the said legacy of five thousand dollars provided in and by the will of the testator for the said J. B. P., deceased, and that the said S. B. P., as such administrator and next of kin and heir, is entitled to have and recover one-fourth part of the one-seventh part of all the rest, residue, and remainder of the property or estate of the testator which was devised and bequeathed to G. H., Jr., M. H., and E. W. H., and the survivors and survivor of them and their successors in trust among other things, to pay the income thereof or convey the principal to the children of the testator's deceased daughter, S. H. P., the late wife of the said S. B. P., and mother of the said minor child J. B. P., deceased.

And it is further declared, that the minor defendants, S. P., S. H. P., and G. H. P., took their respective legacies of \$5000 each, and upon the death of their mother, each of them an equitable vested interest in the one-fourth part respectively of the aforesaid one-seventh part of all the rest, residue, and remainder of the property or estate of the testator (which was devised and bequeathed in trust as aforesaid to said G. H., Jr., M. H., and E. W. H.), subject to the power of said trustees as to the payment of the income and the conveyance of the principal as set forth in said will.

And thereupon it is ordered that it be referred to —, Esq., of —,  
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appointed a special Master in Chancery by the Court for the purposes of this order, in case the parties cannot agree about the same, to  
 \* 2203 state \* the account of the said legacy of \$5000, bequeathed to the said J. B. P., and of the said one-quarter of the one-seventh part of said rest, residue, and remainder of the property or estate of the testator to which the defendant S. B. P. is entitled as the administrator, next of kin, and heir-at-law of the said minor J. B. P., deceased, and to pass upon any other matter which may properly come before him, the said Master as a Master in Chancery, preparatory to entering a final decree, said Master's report to be made and filed in the clerk's office at T. as soon as may be.

And it is further ordered that all other matters be reserved until the coming in of the agreement of the parties or the Master's report.  
 Clerk.

9. DECREE DIRECTING AN ADMINISTRATOR DE BONIS NON HOW TO APPROPRIATE THE RESIDUE OF AN ESTATE IN PAYMENT OF LEGACIES.

Bristol, ss.

Supreme Judicial Court.

C. W. S., Ex'or, in Equity, v. H. B. S. and others.

At Chambers, in Boston, March 4, 1863.

And now the said C. W. S. having resigned and been removed from the office of executor, and J. W. having been appointed administrator *de bonis non* of the estate of said D. S., with the will annexed, and the said J. W., administrator, having voluntarily come in and made himself the party plaintiff to said bill, in the place of said C. W. S., executor;

It is ordered and decreed, that said administrator *de bonis non* with the will annexed, after making provision for the payment of the legacies mentioned in the first nine clauses of the said last will and testament of D. S., appropriate the residue of the estate to the payment of the legacies mentioned in the tenth clause of said will in manner following, viz., that out of said residue he pay the notes mentioned in said clause, as specific legacies chargeable upon said residue; and that he pay the balance of said residue in equal shares to the persons therein mentioned as legatees of the same in equal proportions.

The costs and expenses of this suit to be allowed by the Court and paid out of the funds in the hands of the administrator *de bonis non* with the will annexed.

G. T. B.,

Ch. Jus. Sup. Jud. Court.



\* 10. DECREE SUPPLEMENTAL TO THE ABOVE, AS TO COSTS.<sup>1</sup> \* 2204

Bristol, ss.

Supreme Judicial Court.

Charles W. S., Ex'or, in Equity, v. H. B. S. and others.

At Chambers, in Boston, March 13, 1863.

And now it is ordered and decreed, by way of supplement to the decree passed at Chambers on the fourth day of March, 1863, that the defendants, H. B. S., F. O. S., G. E. S., and C. E. S., be allowed and paid out of the estate of the said D. S., the testator, by the said J. W., the administrator *de bonis non*, their costs as between solicitor and client, the sum of three hundred and fifty dollars; two hundred dollars of which to be paid to their counsel, I. F. R., Esquire, and one hundred and fifty dollars of which to be paid to their solicitors, Messrs. H. & G. E. W.; that the defendants, other than those above named, and other than said J. W., the administrator *de bonis non*, be allowed out of the estate of said testator by the administrator *de bonis non*, their costs as between solicitor and client, amounting to the sum of one hundred and twenty dollars, for counsel fees and disbursements to the Clerk of Court, and for services of the *subpœnas*, to be paid to C. I. R., Esq., their counsel; and that the said J. W., the administrator *de bonis non*, be allowed out of the estate of the testator, his costs and expenses of this suit, to wit: the sum of one hundred dollars paid to E. A., his counsel and solicitor.

G. T. B.,

*Ch. Jus. Sup. Jud. Court.*

By the Court.

11. DECREE DECLARING VOID CERTAIN TESTAMENTARY PAPERS, NOT BEING EXECUTED ACCORDING TO THE LAW OF THE TESTATOR'S DOMICILE AT HIS DECEASE; ORDERING THE PERSON HOLDING PROPERTY OF DECEASED FOR DISPOSITION ACCORDING TO SAID TESTAMENTARY PAPERS TO PAY OVER TO THE ADMINISTRATOR OF DECEASED.

"That the said Sir J. C., in the bill mentioned, at the time of the writing, and executing the letters mentioned in the said bill, and also at the time of his death, was domiciled in the Province of New Brunswick, and that the letters aforesaid purport to be, and are, testamentary papers; and that the legal validity and interpretation thereof are to be governed and adjudged by the laws of said Province; and that

\* the same not being executed so as to be binding as a will and \* 2205 testament by the laws of the said Province, they are to be deemed to all intents and purposes as testamentary papers, a mere nullity, and of no effect, and that the said Sir J. C. is, therefore, to be deemed to have died intestate; and that the said T. C. G., having been duly appointed administrator of the goods and effects of the said Sir J. C., is

<sup>1</sup> In reference to the authority for this proceeding, see *ante*, Vol. II. p. 1030, and note 6.

entitled to have and hold as such, the assets of the said Sir J. C., now in the hands of the said W. A., as in his answer is stated and admitted. And it is thereupon ordered and decreed by the Court that the said W. A. do forthwith pay over the same to the said T. C. G., as administrator, deducting therefrom the amount which shall be awarded to him as costs in this cause by the Court, as hereinafter stated. And the Court do further order and decree that the said W. A. be allowed his reasonable costs, as between client and solicitor in this cause to be settled, in case of difference between the parties, by a Master of the Court. And that the defendants Jacob A. H. and Julia A. H. his wife do neither receive nor pay any costs; and that the costs of said T. C. G., in the cause, be a charge upon the assets to be received in pursuance of this decree." *Grattan v. Appleton*, U. S. Circuit Ct. 3 Story, 767.

## 12. EXECUTION OF POWER MADE GOOD.

### (a.) *Defect of execution of appointment by will supplied.*

The Court doth declare, that the will of M. L., widow, deceased, in the pleadings, &c., is, notwithstanding the defect in the execution thereof, a valid execution of the power of appointment given her by the will of J. L., the testator in the pleadings, &c., and that under such will of the said M. L., her daughters, the defendants, M. B., &c., are entitled absolutely to the, &c., and cash carried over in trust in and to the credit of the cause *L. v. L.*, to "The disputed appointment accounts of the said defendants respectively," as in the pleadings mentioned, subject to the payment thereof of the costs of all parties of this suit *pro rata*. Tax all parties' costs of suit, as between solicitor and client. Liberty to apply. *Lucena v. Barnewall*, 5 Beav. 249; 1 Seton Dec. (Eng. ed. 1862) 287.

### (b.) *Inquiry as to exercise of power to appoint.*

And it is ordered [*or*, further ordered] that the said Master do inquire whether the testatrix executed any deed or deeds other than those mentioned in the pleadings, which operates or operate as an appointment of her real estate, or of any, and what part thereof pursuant to the power contained in the indenture dated, &c., and if so, what is the nature and effect thereof. 1 Seton Dec. (Eng. ed. 1862) 287.

### (a.) *Will established, except as to legacies partly failing.*

The Court doth declare that the will ought to be established, &c., except as to so much of the charity legacies thereby bequeathed as are directed to be paid out of the money to arise by sale of the testator's real and leasehold estates, or to come out of any mortgages or chattels real belonging to the testator, and decree the same accordingly; and as to so much of the said charity legacies as is directed to be paid out of the money to arise by sale of the said freehold and leasehold estates,

the Court doth declare that the same is void, as being contrary to the statute passed in the ninth year of the reign of his late Majesty King George II., entitled "An Act to restrain the disposition of lands, whereby the same became alienable." 1 Seton Dec. (Eng. ed. 1862) 329.

(b.) *Will established, — except as to charity devise.*

Established will. "Except as to the devise of the testator's real estate, in the event in the said will mentioned, to the use of, &c., in charity, and declare that such devise is void by the statute, &c."

(c.) *Gifts by deed and will in charity declared void.*

The Court doth declare, that the charitable gifts contained in the indenture of, &c., and the will of the same date of C., the testator in, &c., so far as such gifts are payable out of his real estate or personal estate savoring of realty (which has arisen from or is connected with land) are null and void by the statute, &c. 1 Seton Dec. (Eng. ed. 1862) 330.

(d.) *Inquiries as to charities and their treasurers.*

And it is ordered [or, further ordered] that the said Master do inquire what are the several charitable institutions intended in the residuary bequests contained in the will of the testatrix; and who are the present treasurers of such charitable institutions respectively; and in case there shall be no such treasurer, then who are the trustees or managers thereof respectively.

(e.) *Inquiries as to charities and lands in mortmain.*

And it is further ordered that the said Master do inquire, whether there were or was at the testator's decease, any and what ragged schools or ragged school established, and in operation at S., in the county of G., and whether any and which of them are or is still in operation. and if so, what are or is the nature and constitution of such charities respectively; and that said Master do also inquire, whether there was, at the testator's decease, any and what land belonging to or vested in the \*college in his will named, called Morden College, Black- \* 2207 heath, sufficient and available for the purpose of a library being built thereon, such inquiries to be without prejudice to any question as to the validity or effect of any bequest contained in the testator's will and codicils, or any of them. 1 Seton Dec. (Eng. ed. 1862) 333.

14. ADMINISTERING CHARITY. — ORIGINAL DECREE.

(a.) *Decree for scheme for regulating charity; new trustees: inquiry as to value, income, and letting property: rents.*<sup>1</sup>

Let a scheme for the future regulation and management (administration) of the charity in the pleadings mentioned, and the application of

<sup>1</sup> For substance of bill requesting that a new scheme may be devised to effectuate the general purposes of the donor, see American Academy of Arts and Sciences v. Harvard College, 12 Gray, 582.

the present and future income thereof be settled by, &c.; 2. And let new trustees be appointed for the management (administration) of the said charity, and of the estates (funds) and property thereof; and let provision be made in the said scheme for the future appointment of trustees; and let the following inquiries and account be taken and made, that is to say: 3. An inquiry of what the property of the said charity consists, and where the same is situate, and what is the income and annual value thereof, and how, and by whom, and under and upon what terms, rents, and conditions the same and every part thereof is let and is now held; 4. An account of the rents and profits of the charity estates received by the defendants or by any other person, &c., and of the application thereof from the — day of —, the date of the filing the information in this cause. Adjourn, &c. *Att'y-Genl. v. Ilchester*, 1 Seton Dec. (Eng. ed. 1862) 342, 343.

(b.) *Directions for scheme — for regulating charity.*

Let a scheme for the (future) regulation and management (administration) of the charity in the pleadings (petition) mentioned [and of the estates (funds) and property thereof, *or*, and for the application of the income and the selection of fit objects thereof, *or*, and filling up any vacancy in the number of the trustees] be settled, &c. 1 Seton Dec. (Eng. ed. 1862) 343.

(c.) *Another form.*

Let the cause be referred to a Master to report a scheme for the accomplishment of this purpose (*the purpose declared*), to be laid before the Court for its consideration, and all further directions are reserved.<sup>2</sup>

\* 2208 \* 15. ADMINISTERING CHARITY. — FURTHER ORDER.

(a.) *Order adopting new scheme filed.*

Let the scheme dated, &c., which has been approved (and signed) by the, &c., and filed in the, &c., of this Court, be the scheme for the (future) regulation and management (administration) of the charity in, &c., mentioned, and the estates (funds or property), and for the application of the income (selection of the objects) thereof [*if required*, and let the several persons in the said scheme named be appointed trustees of the said charity]. Directions to tax and pay costs and expenses. 1 Seton Dec. (Eng. ed. 1862) 347.

(b.) *The like. — Another form.*

Let the scheme dated, &c., for the (future) regulation and management, &c., of the charity in question (and of the estates, funds, and

<sup>2</sup> *American Academy of Arts and Sciences v. Harvard College*, 12 Gray, 582, 599. See *Jackson v. Phillips*, 14 Allen, 539, 596-599.

property thereof), which has been approved by the Court, and filed in the, &c., of this Court, be carried into effect. 1 Seton Dec. (Eng. ed. 1862) 347.

(c.) *The like. — Another form.*<sup>1</sup>

(*Inter Alia.*) Whereupon it was ordered by the Court that the matter be referred to one of the Masters in Chancery, to report a scheme for carrying into effect the *general charitable intent and purpose of the donor, conformably to the prayer of the plaintiff's bill*; and now J. B. D., Esq., one of the Masters in Chancery for the county of S., having reported a scheme in pursuance of said order, which, being heard and considered by the Court, and no objection being made thereto by the defendants, *the same appearing reasonable and conformable to the general intent of the donor*, is accepted, and it is therefore by the Court ordered, adjudged, and decreed, for the reasons set forth in the bill, that the plaintiffs be, and they are, by the authority of this Court empowered to make from the income of said fund as it now exists, at any annual meeting of the Academy, instead of biennially as directed by the said Benjamin Count Rumford, award of a gold and silver medal, being together of the intrinsic value of three hundred dollars, as a premium to the author of any important discovery or useful improvement on heat, or on light, which shall have been made and published by printing, or in any way made known to the public, in any part of the continent of America, or any of the American Islands, preference being always given to such discoveries as shall, in the opinion of the Academy, tend most to promote the good of mankind; and to add to such medals as a further reward and premium for such discovery or improvement, if the plaintiffs see fit so to do, a sum of money not exceeding three hundred dollars.

\*“And it is further ordered, adjudged, and decreed, that the \* 2209 plaintiffs may appropriate from time to time, as the same can advantageously be done, the residue of the income of said fund, hereafter to be received, and not so as aforesaid awarded in premiums, to the purchase of such books and papers and philosophical apparatus (to be the property of the said Academy), and in making such publications, or procuring such lectures, experiments, or investigations as shall in their opinion best facilitate and encourage the making of discoveries and improvements which may merit the premiums so as aforesaid to be by them awarded. And that the books, papers, and apparatus so purchased shall be used, and such lectures, experiments, and investigations be delivered and made, either in the said Academy or elsewhere as the plaintiffs shall think best adapted to promote such discoveries and improvements as aforesaid, and either by the Rumford Professor of Harvard University, or by any other person or persons, as the plaintiffs shall from time to time deem best.

“And it is further ordered, adjudged, and decreed that the said fund, or any part thereof, may be from time to time invested by the plaintiffs

<sup>1</sup> American Academy of Arts and Sciences v. Harvard College, 12 Gray, 601, 602.

either in notes, stocks, or debts of the United States, or of the Commonwealth of Massachusetts, or of the city of Boston, or in stock of the Bank of the United States, or of any bank in this Commonwealth, or in notes or bonds secured by pledge of any of said stocks, or by mortgage of real estate in this Commonwealth, or may be deposited in trust and on interest with the Massachusetts Hospital Life Insurance Company."

The original gift was of "stock in the funds of the United States of North America," and accumulations were directed to be invested in the same funds; as to which the Court make this declaration.

(*Inter Alia*), "It also appears to the Court that it would tend to promote the general charitable intent of the donor to allow the plaintiffs to invest the principal of the said fund in some safe and productive securities other than the stocks of the United States."

(d.) *Reference to Master to report scheme, and decree thereupon.*

Let the case be referred to E. A., Esq., Master in Chancery, to report a scheme for the administration of the trust, set forth in the bill, by the town of M., *as near as possible* in conformity to the intent of the testator, especially keeping in view that the income of the fund is to be applied for educational purposes, "distinct from the public schools of the town."

And now the report of the Master in Chancery, to whom it was referred to report a scheme, &c., as set out in the interlocutory decree passed at the October term of this Court, for the year 1867, having come in, describing the property held by the plaintiffs the \*2210 present \*trustees under the will of the late Z. M. B., it is ordered that said report be accepted; and it is thereupon further ordered, adjudged, and decreed that the present trustees, the plaintiffs, H. B., N. H. B., L. Le B., and J. R. T., do, and they are hereby required to, transfer the principal sum of the property so held by them in trust, to the inhabitants of the town of M., in their corporate capacity as a town, upon the trusts to apply the same to the purposes of education in higher branches than are taught in primary schools, for the benefit of the youth of the town of M., and distinct from the public schools of said town; and that upon such transfer by said trustees to the town of M., then the said trustees be and they shall be thereupon discharged from their said office and duty as trustees.

And it is further adjudged and decreed that no part of the principal sum aforesaid, to wit, the deposits in the three savings banks mentioned in the Master's report, amounting to \$3000, and the United States bonds amounting on the face thereof to \$4900, as mentioned in the Master's report, ought ever to be invested or expended either in building or purchasing a school-house, or expended in any way; but that said principal sum shall always be kept invested by said town to produce income or interest either in United States securities, State securities, county securities or securities of towns other than of said town of M., or in savings banks duly created by law; and that the income or interest

shall be collected as it accrues by the town treasurer of M., who shall keep a separate and distinct account thereof and make a report thereof annually to the town, as part of the treasurer's report; and that the income or interest so received by the town treasurer, shall be by him paid out in maintaining forever the school hereafter mentioned, to be called the "Barstow School," in honor of the founder, as long a time each year as the income will sustain such school.

And it is further ordered, adjudged, and decreed that the general school committee for the time being of the town of M., shall be, and they hereby are, always required, from time to time, after examination, to give certificates of admission into said school to all scholars in said town whom they shall find sufficiently advanced in their studies to enter a high school; and that said general school committee shall procure a suitable school-room and seats for scholars on the best terms they can, provided the town or individuals shall not furnish the same without charge to the income of said fund, and cause said school-room to be properly warmed, when the school shall be kept in cold weather, provided such warming shall not be done by the town or by individuals without charge to the income of said fund; and said general school committee shall, distinct from the public schools of said town, employ a teacher competent to teach the higher branches, such portion of each year as the income of said fund so held in trust by said town will sustain the said school; and that the general school committee of said \* town of M. shall act as overseers of said school, and \* 2211 audit and allow the just and reasonable accounts of the expenditure for sustaining said school, and draw orders for the payment thereof, upon the treasurer of the town, not exceeding the amount of income on hand at the time of drawing such orders in favor of persons entitled thereto.

And it is further ordered and decreed that the plaintiffs, the present trustees, do pay out of the income now in their hands amounting to \$646.11, the sum of one hundred dollars to R. C. P., Esq., for his services as solicitor and counsel for the plaintiffs; the sum of one hundred dollars to C. T. B., Esq., for his services as solicitor and counsel for the defendants; the sum of one hundred dollars to E. A., Esq., for his services as Master in Chancery, and expenses of travel to M., and N. B., at the hearing, and for preparing and reporting the scheme, and framing decree; twenty-five dollars to pay the printer for printing the pleadings, and case for the full Court, at Law term; fifteen dollars and eighty cents to W. H. W., Esq., clerk of the Courts, for his entry, term fees, preparing papers for Law term for all the Judges and recording; and one dollar and seventy cents more for an attested copy of this decree to be furnished the town clerk of M., for record; and thirteen dollars and seventy cents for certain disbursements by said C. T. B., Esq., in his said service as solicitor and attorney and counsel as aforesaid; the balance of said \$646.11 over and beyond said sums to be paid over by the plaintiffs, said trustees, into the hands of the town treasurer, to be expended with income hereafter to be received in carrying on said school as hereinbefore directed.

And either of the parties to this suit may apply to the Court upon the foot of this decree as occasion may require.

By the Court,

E. R. II., J. S. J. C.

(e.) *Extract from scheme constituting a charity as to appointment of trustees, &c.*

1. The full number of the trustees of the charity shall be twelve, and A. B., of &c., and, &c., shall be the first trustees; 2. It shall be lawful for any trustee to resign his office by a notice in writing, given to the clerk of the charity, to be appointed as hereinafter mentioned, and, independently of death or resignation, the office of any trustee who shall become incapable to act, or shall wholly cease to act, for the period of two years, or shall become bankrupt, or take the benefit of any act for the relief of insolvent debtors, or, except as to any of the above-named persons now residing at a greater distance, shall cease to reside within the county of W., shall *ipso facto* become vacant. 3. Whenever the number of trustees shall be reduced to or below five, the surviving or continuing trustees shall apply in Chambers to the \* 2212 Judge of the Court of Chancery, to whose Court these causes may be attached for the appointment of new trustees, and so many new trustees shall be appointed by such Judge as may be necessary to make up the original number of twelve trustees, and directions shall thereupon be given for vesting the property of the charity, other than Government stock (in the whole body of trustees as newly constituted by virtue of such appointment). 1 Seton Dec. (Eng. ed. 1862) 348.

(f.) *Apportionment of costs.*

And let the costs of this application and consequent thereon be apportioned ratably among the said several charities, according to the annual income thereof respectively; and let the amounts apportioned in respect of such costs be paid out of any funds in hand belonging to the said several charities, or out of the annual income thereof respectively. 1 Seton Dec. (Eng. ed. 1862) 350.

(g.) *Relator's extra costs of suit out of charity funds.*

Let the defendants, the Coopers' Company, reimburse to the petitioners, the relators, out of the charity funds, the costs and expenses incurred by the petitioners in this cause, over and beyond the costs which have been paid by the defendants, the Coopers' Company, as between party and party; and let the Taxing Master inquire whether any costs and expenses have been properly incurred by the petitioners, other than the costs of this cause, relating to the matters in question, and tax and certify the same respectively; and let the defendants, the



Coopers' Company, pay the amount (if any) that the Taxing Master shall certify to have been so properly incurred, out of the said charity funds. 1 Seton Dec. 350.

(h.) *Order to tax costs of Attorney-General separately from relators ; on petition.*

Tax as between solicitor and client, the costs of all parties to these suits, including the costs of the Attorney-General of appearing separately from the relators, of the orders of the 7th day of February, A. D. 1851, and consequent thereon, from the foot of the former taxation, and also the costs of all parties relating to this application; and let so much of the, &c., as will raise the said costs when taxed, be sold, &c.; and let, with the money to arise by such sale, such costs be paid in manner following; that is to say, the costs of the petitioner to Mr. —, the relator's solicitor; the costs of the Attorney-General separately from the relators to Mr. H. H. R., his solicitor; the costs of the defendants, the confrater and poor of the hospital, to Mr. —, their solicitor; and the costs of the defendant V. to Mr. —, his solicitor. 1 Seton Dec. 351.

\* 16. MORTGAGES. — FORECLOSURE.

\* 2213

(a.) *Foreclosure at hearing : mortgagor in possession.*

The Court doth order and decree, that it be referred to A. B., Esquire, Master, &c., to compute what is due to the plaintiff, for principal and interest on his mortgage in the pleadings mentioned, and for his costs of this cause, such costs to be taxed, &c.; and upon the defendant's paying to the plaintiff what shall be reported due to him for principal, interest, and costs as aforesaid, within — months after the said Master shall have made his report, at such time and place as said Master shall appoint, it is ordered, that the said plaintiff do reconvey [resurrender, reassign] the mortgaged premises free and clear of all incumbrances done by him, or any claiming by, from, or under him [*or*, by those under whom he claims], and deliver up upon oath all deeds and writings in his custody or power relating thereto, to the defendant, or to whom he shall appoint. But in default of the said defendant's paying to the plaintiff such principal, interest, and costs as aforesaid, by the time aforesaid, it is ordered and decreed that the said defendant from thenceforth do stand absolutely debarred and foreclosed of and from all [right, title, interest, and] equity of redemption of, in, and to the mortgaged premises. Liberty to apply.

(b.) *Foreclosure, mortgagee in possession ; costs ; repairs ; improvements ; rents and profits ; reconveyance ; default ; infant.*

It is ordered, that the plaintiff's bill do stand dismissed as against the defendant H. S., with costs, and that it be referred to, &c., of this

Court to tax the said costs; and it is ordered, that the plaintiff R. H. do pay to the said defendant his costs when taxed, and what the plaintiff shall so pay is to be added to his own costs, to be taxed as hereinafter directed; and it is ordered that it be referred to G. F. C., Esq., Master, &c., to take the following accounts; that is to say: 1. An account of what is due for principal and interest on the security of the premises comprised in the indenture [*or*, deed], dated, &c. 2. An account of all sums of money paid, laid out, and expended by the said W. M. or the plaintiff [*transferee of the mortgage*] for fines, fees, and costs, &c.; and of all sums of money paid, laid out, or expended by the plaintiff in necessary repairs<sup>1</sup> and lasting improvements of the premises

\* 2214 \* comprised in the said indenture [*or*, deed] of mortgage of, &c.; and in taking the said account, interest is to be computed on the money paid for fines and fees on renewal, and the charges attending the same, and laid out in repairs and lasting improvements, after the same rate of interest as the said mortgage carried; and what shall appear to be due on the said account is to be added to what shall be found due for principal and interest on the said mortgage. 3. An account of the rents and profits of the premises comprised in the indenture [*or*, deed] of, &c., or which without wilful default of the plaintiff might have been received; and what shall be found due from the plaintiff on taking the said account is to be deducted from what shall be found due to him for principal and interest as aforesaid; and in taking the said accounts all just allowances are to be made.

And it is ordered, that it be referred to the said — to tax the plaintiff his costs of this suit.

And it is ordered, that upon the defendants, or any of them, paying to the plaintiff what shall be found to be due to him for principal and interest as aforesaid, together with his costs of this suit, within (*six*) months after the same shall have been certified, at such time and place as shall be appointed, the plaintiff do reconvey and reassign the mortgaged premises for all the plaintiff's interest therein to the defendants or such of them as shall redeem, free and clear of all incumbrances done by the said W. M., or the plaintiff, or any person claiming by, from, or under them or either of them, and do deliver up all deeds and writings in the custody or power of the plaintiff relating thereto, upon oath, to the said defendants or such of them as shall redeem, or to whom they shall appoint.

But it is ordered, that in default of the defendants paying unto the plaintiff such principal, interest, and costs as aforesaid by the time aforesaid, the defendants shall stand absolutely debarred and foreclosed of

<sup>1</sup> In order to entitle the mortgagee to an inquiry as to repairs and lasting improvements, he must establish a case for such inquiry at the hearing. *Sandon v. Hooper*, 6 Beav. 246; *Norton v. Cooper*, 25 L. J. Ch. 121. Where two estates, Whiteacre and Blackacre, are mortgaged to A., and afterwards the mortgagor mortgages Whiteacre alone to B., B. is entitled to have the securities marshalled, so as to

throw A.'s mortgage, in the first instance, on Blackacre. *Gibson v. Seagrim*, 20 Beav. 614. The plaintiff must take care, neither personally nor by his agent, to receive any rents after the date of the Master's report; otherwise he will not be entitled to obtain the order absolute in case of non-payment at the time appointed, or if he should obtain the order, it will, upon application for that purpose, be discharged.

and from all equity of redemption of, in, and to the said mortgaged premises comprised in the said indenture [*or*, deed], &c.

And the said decree is to be binding on the infant defendant A. N., unless he, being served with a *subpœna* to show cause against the same, shall within six months after he should attain his age of twenty-one years, show unto this Court good cause to the contrary.<sup>1</sup> [See Tripp's Forms, 134.]

(c.) *Direction to ascertain damages.*

The Master is also to "ascertain what shall be allowed as a sufficient compensation for the damage done to the estate in question by the destruction of the deeds as found by his report, and the amount of \* what the Master shall find to be proper to be allowed for com- \* 2215 pensation as aforesaid, is to be set off against what shall be found due for principal and interest," and upon the payment, &c., of what shall be found due, &c., "after deducting therefrom the amount of such compensation," &c., &c. *Hornby v. Matcham*, 16 Sim. 327.

(d.) *Sale in default of payment.*

Usual account: Direction for payment to plaintiff, and reconveyance by him. "But in default of defendants paying to the plaintiff, &c., it is ordered and decreed that the said mortgaged premises, or a competent part thereof, be sold with the approbation of the Master; and that the money to arise by such sale be applied in payment of what shall appear to be due to the plaintiff for principal, interest, and costs, as aforesaid, and be in the mean time paid into, &c., to the credit of this cause." Adjourn, &c.

(e.) *Final foreclosure.*

Upon motion, &c., by counsel for the plaintiff, who alleged that by the decree, dated, &c., it was ordered, that it be referred to A. B., Esquire, Master, &c., to take an account, &c., that in pursuance of said decree the said Master on the — day of —, made his report, and thereby certified that there would be due to the plaintiff for principal and interest on his said mortgage, and for his costs, &c., on the — day of —, the sum of \$—, which the said defendant was thereby appointed to pay to the plaintiff on, &c., at, &c., between, &c.; that it appears by the affidavit of the plaintiff, filed, &c., that he did attend on the said — day of —, at, &c., from before the hour of — till after the hour of — of that day, in order to receive from the defendant the said sum of \$—, but the said defendant did not, nor did any person on his behalf, attend

<sup>1</sup> See *Clark v. Reyburn*, 8 Wall. 318. With regard to accounts for repairs, lasting improvements, waste, &c., see *post*, under *Forms for Redemption*.

In *Hunter v. Myatt*, 28 Ch. D. 181, the form

of judgment in *Grundy v. Grice*, 2 Seton (4th ed.), 1036, No. 2, in a foreclosure suit when personal judgement is taken against the mortgagor on his covenant for payment of principal and interest, is modified.

to pay the said sum, and that the said sum hath not, nor hath any part thereof, been since paid to the plaintiff, but that the whole thereof still remains due and owing; and upon reading the said decree, report, and affidavit, this Court doth order that the defendant do from henceforth stand absolutely debarred and foreclosed of and from all [right, title, interest, and] equity of redemption of, in, and to the said mortgaged premises.<sup>1</sup> [*Take the words of the decree.*]

\* 2216

## \*17. EQUITABLE MORTGAGES.

*(a.) Decree for specific performance of agreement to execute a mortgage.*

Declare, that the agreement made, &c., and dated, &c., ought to be specifically performed and carried into execution; and decree the same accordingly; and let the defendant execute to the plaintiffs a proper deed of mortgage of the estate mentioned in the said agreement, according to the terms of the said agreement; and let all proper parties join therein as the Judge [this Court, or the Master] shall direct; and let such indenture of mortgage be settled by the Judge [this Court, or the Master], &c., in case the parties differ; and let the defendant deliver upon oath to the plaintiff the title deeds and documents of title relating to the said estate which are now in his possession or power; and let the defendant pay to the plaintiff his costs of this cause (including the costs of such deed of mortgage), such costs to be taxed, &c. Liberty to apply. 1 Seton Dec. 443.

*(b.) Decree for absolute conveyance, free from all equity of redemption.*

“Declare, that the title deeds relating to the estate in question, having been deposited by A., the bankrupt, in the hands of the plaintiff, the plaintiff is entitled to be considered in this Court as if he were a mortgagee of the premises therein comprised; and decree the same accordingly; and let an account be taken of what is due for principal money advanced on the said deposit, and for interest thereon, and for his costs of this suit, to be taxed, &c.; and declare that such principal, interest, and costs are to be considered as a charge upon the said premises; and let, upon the defendant T. paying to the plaintiff, within — months after, &c., at such place, &c., the plaintiff deliver up all deeds, &c.; but declare, that in default, &c., the plaintiff will be entitled to the said premises, free and clear of and from all right, title, interest, and equity of redemption of, in, and to the same, and to have an absolute conveyance thereof accordingly; and in that case, let the defendant execute such conveyance thereof to the plaintiff to be settled by, &c., in case the parties differ.” Liberty to apply. 1 Seton Dec. (Eng. ed. 1862) 443, 444.

*(c.) Like decree — with Receiver.*

Directions to appoint Receiver. “And let the person so to be appointed pass his accounts, &c., and pay the balances which shall be

<sup>1</sup> See *Clark v. Reyburn*, 8 Wall. 318.

certified to be due from him to the plaintiff, he, by his counsel, undertaking to account for the same in the accounts hereinafter directed ;”

1. Account of what is due to the plaintiff for principal and interest, in respect of his equitable mortgage in the pleadings mentioned, and for \* his costs of suit to be taxed; 2. An account of the \* 2217 balances of the rents and profits of the estates so to be paid to the plaintiff as hereinbefore directed ; and let the same be deducted from what shall appear to be due from the defendant for such principal, interest, and costs as aforesaid ; and let, upon the defendant paying to the plaintiff what shall be certified to be due to him for such principal and interest as aforesaid, together with the said costs when taxed, after such deductions as aforesaid, within — months after, &c., at such place, &c., the plaintiff deliver all deeds, &c. ; but in default of the defendant paying, &c., let the defendant convey, &c. 1 Seton Dec. (Eng. ed. 1862) 444. For decree in case of infants, see *Price v. Carver*, 3 M. & C. 164 ; and for decree for conveyance of estates mortgaged by deposit, and foreclosure of estates legally mortgaged, with receiver of the former, *Holmes v. Turner*, 7 Hare, 369, n.

(d.) *Sale ; mortgage by deposit.*

“ Declare, that the plaintiffs are entitled by virtue of the deposit of the title deeds, and the agreements relating to or accompanying the same in the pleadings mentioned, to an equitable lien or mortgage upon the premises therein mentioned, for securing to the plaintiffs the repayment of the principal sum of \$——, and the interest due thereon ; and decree the same accordingly ;” Account of what is due to the plaintiffs for principal, interest, and costs of suit to be taxed ; “ And upon the defendant’s paying to the plaintiffs what shall be certified to be due, &c., within — months after, &c., at such place, &c. ; let the plaintiffs deliver up the said title deeds, &c. ; but in default, &c., let the said premises, or a sufficient part thereof, be sold with the approbation, &c., and let the money to arise by such sale be paid into the, &c., to the credit of this cause, and be applied in payment of what shall be certified to be due to the plaintiffs for principal, interest, and costs as aforesaid.” Adjourn, &c. 1 Seton Dec. (Eng. ed. 1862) 445.

18. LIENS.

(a.) *Lien on reversion ; conveyance.*

“ Declare that the plaintiff is entitled to a lien in the nature of an equitable mortgage on the defendant’s reversion or remainder, in fee-simple expectant on the death of W., of, &c., of and in the several messuages, &c., therein mentioned, for the sum of \$——, and interest thereon ; and let an account be taken of what is due to the plaintiff for principal and interest on the said sum of \$—— ; and let, upon the defendant paying to the plaintiff what shall be certified to be due for \* prin- \* 2218 cipal and interest in respect thereof, within — months after,

&c., at such, &c., the plaintiff deliver up all deeds, &c., or as he shall appoint, but in default, &c., declare that the plaintiff will be entitled to the said reversion of the said messuages, &c., expectant upon the death of the said W., free and clear of and from all right, title, interest, and equity of redemption of, in, and to the same; and to have a conveyance thereof accordingly; and in that case let the defendant execute to the plaintiff such conveyance, to be settled, &c., if the parties differ." No costs on either side. Liberty to apply. 1 Seton Dec. (Eng. ed. 1862) 450.

(b.) *Lien on costs in another suit declared.*

"Declare that the plaintiffs are entitled to a lien on the costs, and costs, charges, and expenses of the defendant H., in the suits of B. v. J. &c., and are to be at liberty to attend the taxation of such costs, and costs, charges, and expenses, or any part thereof, and from allowing any other person or persons other than the plaintiffs to receive the same." Decree for redemption and foreclosure. 1 Seton Dec. (Eng. ed. 1862) 450, 451. For declarations as to solicitor's lien on title deeds for costs, see *Pelly v. Wathen*, 7 Hare, 351.

(c.) *Decree declaring a lien or charge upon an estate for the increased value by improvements made by a bona fide purchaser, for a valuable consideration, without notice of any defects in the title.*

*First interlocutory decree in the case of John Bright, in Equity, against John W. Boyd.* — And now at this term the cause came on to be heard upon the bill, answer, pleadings, evidence and other proceedings in the cause, and was argued by counsel. On consideration whereof it is ordered, adjudged, and declared by the Court, that is to say, that it appears to the Court, that the plaintiff is the purchaser, for a valuable consideration, of a defective title, without notice of the defect therein, and that improvements have been made by the plaintiff, or his grantors, on the premises of the defendant, under a mistake of title, and that he is entitled to relief in Equity.

That it be referred to a Master, if the parties do not otherwise agree, to ascertain the character and value of said improvements, by whom made, and at what time they were made. Also, that the Master ascertain and report of the value of the rents and profits of the land, on which said improvements are made, and state an account thereof. Also, to ascertain and report the present value of the said land without the improvements, and how far the value of said land is increased by said improvements.

And that the Master is to ascertain the foregoing facts, as well \* 2219 by \* the examination of witnesses as by the examination of the parties, and by other suitable proofs, and to make report thereof to the Court. And that the Master be clothed with all proper powers for the purposes aforesaid, and that further orders and decrees in the premises be reserved until the coming in of the report.

*Report of the Master.* — The Master to whom it was referred to ascertain the character and value of the improvements on the lot in controversy, by whom made, and at what time they were made, and to ascertain and report upon the value of the rents and profits of the land, on which said improvements are made, and state an account thereof; also to ascertain and report the present value of the land without improvements; reports that, as far as he has been able to ascertain the improvements upon said lots were made by John E. Marshal. They consist of a double wooden tenement of two stories, which was built in the years 1834 and 1835, and completed in the early part of the summer of 1838; that the said improvements are worth nine hundred and seventy-five dollars, and that the land without the improvements would be worth at this time twenty-five dollars; and that the land, with the improvements, is now worth one thousand dollars, so that the value of the land is increased by the improvements nine hundred and seventy-five dollars, and that, in his opinion, there would have been no rents or profits from said land if no improvements had been made thereon.

H. W.

Fees, \$——.

*Final decree.* — And now, on coming in of the Master's report, it is ordered, that the same be accepted and allowed.

And it is further ordered, adjudged, and declared that the said improvements, to the value of nine hundred and seventy-five dollars, are a lien upon the whole of the premises described in the plaintiff's bill, and that one-quarter part of the said premises stand charged with one-quarter of the said improvements.

And it is further ordered, that unless one-quarter part of the said sum of nine hundred and seventy-five dollars is paid by the defendant to the plaintiff by the next term of said Court, one-quarter part of the whole of the said premises, with the improvements thereon, shall be sold, and the proceeds thereof, to an amount not exceeding one-quarter of nine hundred and seventy-five dollars, shall be paid over to the plaintiff.

And it is further ordered, that all further orders and decrees in the premises be reserved until further order of Court. *Bright v. Boyd*, 2 Story, 607.

\* (d.) *Decree that subsequent assignees pay to former assignees* \* 2220  
*of an insolvent debtor taxes on real estate held by the*  
*latter under the assignment, and assessed to same while acting*  
*as such assignees, and paid by them after they had ceased to be*  
*assignees, on appeal from decree of Commissioner of Insolvency*  
*disallowing their claim.*

*J. H. L. v. J. M. H. et al.*

And now, upon the pleadings and report of the Judge at Nisi Prius, and after argument by the counsel for the petitioners and for the defend-

ants, the full Court are of the opinion that the Commissioner of Insolvency erred in not allowing to the petitioners the said sum of \$160.44, the amount by them paid out for taxes assessed upon real estate vested in them such assignees for the years 1856 and 1857, as claimed by the petitioners in and by their second account.

It is therefore ordered and decreed that the decree of the Commissioner of Insolvency accepting and allowing said second account, be, and the same hereby is, reformed, so as to allow to the petitioners the said sum of \$160.44, and that said sum of \$160.44 so paid out for taxes be, and the same hereby is, allowed to the petitioners as claimed by them in said second account.<sup>1</sup>

J. M. H., new assignee, to pay costs to the petitioners out of the funds in his hands as such assignee, and execution to be awarded accordingly therefor against J. M. H., with directions inserted therein for said costs to be paid out of said funds. *Loud v. Holden*, 14 Gray, 154.

E. A., *Solicitor for Plaintiff*.

#### 19. DECREE FOR DELIVERING POSSESSION OF MORTGAGED PROPERTY TO MORTGAGEES.<sup>2</sup>

This cause having been heard upon the bill and answer, and it thereupon appearing to the Court here, that the said Norfolk County Railroad Company did duly make, execute, and deliver to the said R. G. S. and others the said deed of trust and of mortgage, and did also duly make, execute, issue, and deliver to divers persons their bonds for the payment of money and the interest accruing thereon, as in the said bill is particularly set forth; and it further appearing to the Court here, that the said Norfolk County Railroad Company have since failed and neglected, and still do fail and neglect, to pay to the respective holders the interest which has accrued and become due upon said bonds according \* 2221 \* to the tenor thereof, and to fulfil and comply with the stipulations contained in the same, and that by reason of such failure and neglect to pay said interest, and to fulfil and comply with such stipulations, the plaintiffs being the present trustees under said deed, are entitled as against said Norfolk County Railroad Company and its successors, to take, have, and hold possession of the whole property conveyed to the said R. G. S. and others in and by the said deed of trust and of mortgage, and to manage and dispose of the same according to law, for the purposes in the said deed specified.

It is, therefore, thereupon ordered and decreed by the Court here, that possession of all the said property, rights, and estate conveyed in and by the said deed to the said R. G. S. and others, be delivered to the plaintiffs by the said Norfolk County Railroad Company and by their officers, agents, servants, and successors, and by any and all persons and corporations, their officers, servants, and agents, who have derived or acquired any right, title, or claim thereto from or under

<sup>1</sup> See form of decree on similar principle, in *Murray v. De Rottenham*, 6 John. Ch. 52.

<sup>2</sup> *Shaw v. Norfolk Co. R. R. Co.* 5 Gray, 184, 185.



said Norfolk County Railroad Company, or in consequence of any act done or vote passed by them since the commencement of the proceedings against them upon the bill aforesaid; to be held, managed, and disposed of by the plaintiffs according to law, under the provisions of the deed aforesaid, until the further order of this Court relative thereto.

And it is in like manner further ordered and decreed, that the said Norfolk County Railroad Company, their successors and assigns aforesaid, and their respective officers, agents, and servants, be and hereby are severally required and commanded, forthwith, upon demand of the plaintiffs, to deliver to them possession of the said property, rights, and estate, and of any and every part thereof, and are forbidden and enjoined from thereafterwards intruding or interfering with the plaintiffs in their exclusive use, occupation, and enjoyment of any part of said property, rights or estate, without, or until, the further order of this Court relative thereto.

## 20. MORTGAGES. — REDEMPTION.

(a.) *Decree for redemption and account against mortgagee in possession.*  
[English Form.]

*Among other things.*] The Court doth think fit and so order and decree, that it be referred to Mr. A. B., one of the Masters, &c., to take an account of what is due to the defendant J. R., for principal and interest on his said mortgage, and to tax him his costs of this suit. And the said Master is also to take an account of the rents and profits \* of the said mortgaged premises come to the hands of \* 2222 the said defendant J. R., or of any other person or persons by his order or for his use, or which he without wilful default might have received. And what shall be coming on the said account of rents and profits is to be deducted out of what shall be found due to the said defendant J. R. for principal, interest, and costs. And for the better taking the said account, all parties are to produce, &c., as the said Master shall direct, who in taking the said account is to make unto the parties all just allowances. And what upon the balance of the said account shall be certified due to the said defendant J. R. for his principal, interest, and costs, it is ordered and decreed that the said plaintiff A. O. do pay the same unto the said defendant J. R. within — months<sup>1</sup> after the said Master shall have made his report, at such time and place as the said Master shall appoint, and that thereupon the said defendant do resurrender [reconvey, reassign] the said mortgaged premises unto the

<sup>1</sup> The decree upon a bill to redeem, should fix the time within which the redemption is to take place: and should direct that the plaintiff's bill be dismissed with costs, if the money be not paid within the time prescribed. *Waller v. Harris*, 7 Paige, 167; *Shannon v. Speers*, 2 A. K. Marsh. 312; *Dennett v. Codman*, 158

Mass. 371; *Chicago & Calumet R. M. Co. v. Scully*, 141 Ill. 408; 43 Ill. App. 622. The time to be fixed is within the discretion of the Court, and, being fixed, will not be enlarged. *Perine v. Dunn*, 4 John. Ch. 140; *Novosielski v. Wakefield*, 17 Ves. 417; see *Beever v. Lawson*, L. R. 4 Eq. 537, 549.

said plaintiff A. O., or unto such person or persons as he shall direct, free and clear of all incumbrances done by him or any person claiming by, from, or under him. But in default of the said plaintiff's paying unto the said defendant J. R. what shall be so certified due to him for principal, interest, and costs, as aforesaid, after such deductions made thereout as aforesaid, at such time and place as aforesaid, it is ordered that the said plaintiff's bill as against the said defendant J. R. do from thenceforth stand dismissed out of this Court, with costs, to be taxed by the said Master.

(b.) *Another form: by agreement.*

*Among other things.*] And in pursuance of the agreement of the parties, which makes part of the report of said cause, this Court doth order that the cause be referred to W. J. H., one of the Masters in Chancery of said county of S., to take an account of all sums due the said C., or his assignees, the said J. and M., as mortgagees of said bond or contract of the Commonwealth for the conveyance of said half township of land, with interest thereon, and of all sums received, or which with the use of common care or prudence might have been received, by said defendants, C., or J. and M., on account of said bond or contract, or from the use or occupation of said land by said defendants, or persons acting under their license or authority, stating in separate accounts the amounts received, or which with due care ought to have been received, by said C., and by said J. and M., respectively, with interest thereon.<sup>2</sup>

\* 2223

(c.) *Occupation rents.*<sup>1</sup>

And it being alleged, that the defendant has been in the actual possession and enjoyment of the said mortgaged premises since the — day of —, it is ordered that the Master do inquire whether the defendant has been so in the possession and enjoyment, as alleged, of the whole of the premises or any part thereof; and if he so find, it is ordered that he do set an annual value by way of occupation rent thereon during the time of the occupation thereof, and charge the defendant with said value in the said account of rents and profits.

(d.) *Repairs and lasting improvements.*

And it is ordered that the Master do take an account of all sums of money laid out or expended by the defendant in necessary repairs and lasting improvements on the premises comprised in the said mortgage, and let interest be computed on the sums which shall appear to have been so laid out in lasting improvements after the same rate of interest as the said mortgage carries, and let what shall appear to be due on the last-mentioned account be added to what shall appear to be due for principal, interest, and costs on said mortgage.<sup>2</sup>

<sup>2</sup> See *Pingree v. Coffin*, 12 Gray, 312.

<sup>1</sup> To charge a mortgagee in possession with occupation rent, the mortgagor should allege, and show that he actually occupied. *Trulock v. Robey*, 15 Sim. 265, 276, n.; S. C., 2 Ph. 395.

<sup>2</sup> See the specific directions given to the Master in a case where the inquiry was whether the rents would be sufficient to pay for the necessary expenses of preserving the estate, in *Sparhawk v. Wills*, 5 Gray, 430.

*(e.) Rests.*

And let what shall appear to be due on the said account of rents and profits be applied, first in discharging the interest, and then in sinking the principal money secured by the said mortgage, and if the same shall break in upon the principal, then rests are to be made from time to time, and interest to be computed only on the residue thereof.

*(f.) Deterioration.*

And it is ordered that the Master do inquire whether the mortgaged premises have been deteriorated since the defendant hath been in possession thereof, by the wilful neglect of the defendant in not repairing the same, and to what extent.<sup>3</sup>

*(g.) Strip and waste.*

And it is further ordered that the said Master do take an account of all wood and timber cut down and carried off by said C. L. from said mortgaged premises, and of all other strip and waste by said C. L. committed on the said mortgaged premises.

*\*(h.) Inquiry as to brickmaking on the premises.* \* 2224

That the Master do inquire what parts of the said mortgaged premises, and from and during what time, have since the said A., deceased, took possession of the said premises, been made use of for the purpose of making bricks and tiles, or for getting earth or clay from which bricks and tiles have been made; and let a fair and proper occupation rent be set for such parts of the said mortgaged premises, having regard to the rent for which such parts would from time to time have let to brickmakers for the purpose of making bricks and tiles therefrom.

*(i.) Account of insurance premiums.*

That the Master do take an account, &c., including the sums the defendant has paid for premiums on the policy of insurance in the pleadings mentioned, with interest thereon at the same rate as the mortgage carries.

*(j.) Common form of decree for reference on a bill to redeem against mortgagee in possession.*

The Court doth order and decree that it be referred to G. F. C., Esq., one of the Masters of this Court, to take an account of what is due to the defendant for principal and interest on the mortgage in the pleadings mentioned, and that the said Master do also take an account of the rents and profits of the said mortgaged premises received by the defendant, or by any other person or persons by his order, or for his use, since the — day of —, or which without his wilful default

<sup>3</sup> Inquiry as to loss by mortgagee in possession, having pulled down cottages. *Sandon v. Hooper*, 6 Beav. 250.

might have been received thereout. And what shall be coming on the said account of rents and profits, to be deducted out of what shall be found due to the defendant for principal and interest. And in case the said Master shall find that the said defendant has been in possession and held the said premises as owner thereof, then the said Master is to set a rent thereon, and take the account accordingly. And in taking the said accounts, he is to make to the parties all just allowances, and particularly for all necessary repairs and lasting improvements which have been made by the defendant on the said mortgaged premises since the —; with the usual directions, &c.

*(k.) Another form for the same.*

That it be referred to, &c., to take and state an account of the principal and interest remaining due of the debts secured to be paid by the two mortgages first above mentioned, and of the rents and profits of the said mortgaged premises which the said A. B., as purchaser thereof, has received or might with ordinary care and diligence have received, since the time of the said purchase, on the — day of —, to the  
 \* 2225 time at \* which the Master shall make his report, and also the value of the beneficial and permanent improvements now existing, if any, which the said A. B. has caused to be put upon the said mortgaged premises, and also the injury, waste, or deterioration of the said mortgaged premises, or in the value thereof, if any, by the said A. B., or any person or persons under him during the time aforesaid.

*(l.) Another form for the same.*

Circuit Court of the United States,  
 Massachusetts District.

This cause came on to be heard at this term, counsel being present; and thereupon, upon consideration thereof,

It is ordered, that it be referred to C. B. G., Master, to take an account and ascertain and report the amount due on the mortgage described in the plaintiff's bill. And the said Master is to make his report touching the matter hereby referred to him with all convenient speed.

By the Court,

Attest, H. W. F., *Clerk.*

*(m.) Dismissal of bill for redemption, on plaintiff's failure to pay the amount found due on the mortgage.*

Upon motion, &c., by counsel for the defendant, who alleged that by the decree, dated, &c., it was referred to Mr. A. B., &c., to take an account, &c. That in pursuance of the said decree, the said Master made his report, dated, &c., and thereby certified that there would be due to the defendant for principal and interest on his said mortgage, and for his costs, &c., on the — day of —, the sum of \$—, which the said plaintiff was thereby appointed to pay to the defendant on, &c., at, &c., between, &c.; that it appears by, &c., that he did attend,

&c. [*naming the place and time appointed*], in order to receive from the plaintiff the said sum of \$—, but the plaintiff did not, nor did any person on his behalf, attend to pay the said sum, and that the said sum hath not, nor hath any part thereof, been since paid to the defendant, but that the whole thereof still remains due and owing; and upon reading the said decree, the said Master's report, &c., this Court doth order that the plaintiff's bill do stand dismissed out of this Court with costs, to be taxed, &c., and paid to, &c., pursuant to said decree.<sup>1</sup>

\* (n.) *Decree for surrender of mortgaged premises on payment of amount found due on the mortgage; in default of payment, bill dismissed, and redemption barred.* \* 2226

Circuit Court of the United States, }  
Massachusetts District. } May T., 1855.

W. H. v. W. Bank.

This cause was thence continued to the present term of this Court, when same came on for a hearing upon exceptions taken to said Master's report, and on a Bill of Revivor, and thereupon and in consideration thereof, it is ordered, adjudged, and decreed, that if said T. B. H., S. B. H., J. C. S., and E. S., named in said Bill of Revivor, shall, within sixty days from the fifteenth day of May, A. D. 1855, pay or cause to be paid to said defendant the sum of fifteen thousand six hundred and seventy-five dollars and ninety-nine cents, with interest thereon, from this fifteenth day of May, A. D. 1855, to the day of payment, together with the defendant's costs of this suit taxed at —,

Thereupon said defendants shall surrender said mortgaged premises unto the said T. B. H., S. B. H., J. C. S., and E. S., and to their heirs and assigns for ever, free of and discharged from said mortgage and all incumbrances created or made by them. But in default of the payment of said sums of fifteen thousand six hundred and seventy-five dollars and ninety-nine cents with interest thereon, and of three hundred and sixty and  $\frac{41}{100}$  dollars costs of suit, on or before the said time of payment as aforesaid, it is ordered and decreed, that said bill shall stand dismissed out of this Court, and that no person claiming from or under said original plaintiff shall have any further claim or right to redeem said premises from the force and effect of said mortgage, set forth in the plaintiff's bill.

(o.) *Decree, — among other things, — declaring an instrument in writing a mortgage, subject to redemption.*

“And this Court doth further declare that the instrument in writing, bearing date the thirty-first of August, eighteen hundred and forty-four,

<sup>1</sup> See *Stuart v. Worrall*, 1 Bro. C. C. 581. Where a party fails to redeem within the time allowed, it is usual to dismiss the bill, which amounts to a bar of the equity of redemption.

*Perine v. Dann*, 4 John. Ch. 140; *Cholmley v. Oxford*, 2 Atk. 267; *Bishop of Winchester v. Paine*, 11 Ves. 199; *Ex parte Paine*, 3 De G. J. & S. 458.

signed by said C., and delivered to said S., was a mortgage, under and by virtue of which said C. and his assignees with notice held the bond or contract of the Commonwealth as mortgagees, and subject to the right of said Smith or his assignee to redeem the same in Equity.”<sup>1</sup>

\* 2227 \* (p.) *Decree for redemption where an absolute deed was shown to be a mortgage by parol evidence.*<sup>1</sup>

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed by the Court, that the said conveyance, by way of release and assignment of the premises in the pleadings mentioned, to the said Martin Luther (the defendant) be, and is hereby declared to be, not an absolute conveyance and assignment, but a mere mortgage of the premises to the said defendant, and as such the plaintiffs are entitled to redeem the same upon payment of all moneys and just claims, which the said defendant hath secured to him by and in the same premises, in virtue of and under the same conveyance and assignment; and it is hereby decreed that the plaintiffs be allowed to redeem the same accordingly.

And it is further ordered, adjudged, and decreed that it be referred to a Master for this purpose, to take an account in the premises, making all due allowances, and charging the defendant with all receipts and profits, with the usual powers of Masters in such cases to examine the parties, and to take other evidence in the premises, and to call for all proper vouchers and papers, and to make report of his doings, &c.

And all further orders and decrees are reserved until the coming in of the Master's report. *Taylor v. Luther*, 2 Sumner, 237, 238.

(q.) *Decree declaring an absolute deed to be a mortgage, given to secure a debt; absolute sale by the mortgagee, without notice, destroying the equity of redemption, a constructive fraud; defendant (mortgagee) to pay to the mortgagor the value of the land and of the rents and profits, after deducting the principal and interest of the debt for which the deed was made.*

United States Circuit Court, }  
Massachusetts District. } Oct. T., 1855.

This case having been heard on the bill of complaint filed therein, and upon the answer of the defendant thereto, and upon the proofs exhibited by the respective parties, and the parties having been fully heard by their counsel, this Court doth declare the conveyance of N. W. to said defendant, bearing date the twentieth day of November, in the year one thousand eight hundred and twenty-eight, to have been a mortgage to

<sup>1</sup> See *Pingree v. Coffin*, 12 Gray, 312.

*Parker*, 22 N. J. Eq. 453; *Phillips v. Hulsizer*,

<sup>1</sup> See *Henry v. Clark*, 7 John. Ch. 40; 20 id. 308.

*Wyman v. Babcock*, 2 Curtis, 386; *Sweet v.*

secure the debts the amount whereof is named in said deed as the consideration of the same, and that at the times of the sales of the lands in said conveyance set forth by the defendant, the assignor of the plaintiff had the right to redeem the same.

\* And doth declare that the absolute sales and conveyances by \* 2228 defendant of said lands to *bona fide* purchasers for valuable consideration without notice, was a constructive fraud upon the rights of the assignor of plaintiff, and that therefore he became entitled as against the defendant personally to an account of the value of the lands and of the rents and profits thereof; and after deducting the amount of principal and interest due said defendant, to the payment of the balance.

And doth declare that the plaintiff as assignee has succeeded to those rights.

And said cause having been referred to a Master to take the necessary accounts in pursuance of the foregoing declaration of this Court, and said Master having made his report in the premises, and the same being duly considered, the respective parties heard therein, this Court doth order and decree that there be paid by said defendant to said plaintiff the sum of twelve thousand and sixty-seven dollars and nine cents, together with costs. *Wyman v. Babcock*, 2 Curtis C. C. 386.

(r.) *Outlines of a decree, declaring plaintiffs entitled to redeem against purchaser with notice of plaintiffs' right, and a reference in regard to the amount due on the mortgages, the rents and profits, the improvements and waste.*

The Court doth declare, that the plaintiffs, who are judgment and mortgage creditors, are entitled to redeem the seventy acres covered by the two mortgages, upon paying the amount due thereon; and that the claim of G. D., to set up a mortgage debt upon other lands, and a book debt against M. Mc., as a condition of such redemption, was unwarranted and unlawful, inasmuch as the case warrants the presumption and conclusion of law, that these debts were paid; and if not paid, the plaintiffs who were such creditors, and who had no previous notice of them, were not bound to pay them. And the Court doth further declare, that the sale by G. D. was unlawful and fraudulent, because the notice of sale contained a false assertion, that these seventy acres were covered by a third mortgage, which was upon other lands only, and because no place of sale was specified in the notice, and because the power to sell under the third mortgage upon other lands was, in itself, null and void, and because the sale was made, after a tender was made of the sum due upon the two mortgages on the seventy acres, with the costs. And the Court doth further declare that W. G. D., the defendant, was a purchaser chargeable with notice of the right of the plaintiffs, and of the tender; and even without notice, he would have been a purchaser, under the circumstances of the sale, subject to the right of redemption of the plaintiffs, and that J. Mc., the original plaintiff, died, seised in fee of

the said mortgaged premises, subject to the incumbrances \* 2229 chargeable thereon; and that \* the other plaintiffs are his lawful heirs, entitled to the same rights. And the Court doth order and decree that it be referred to a Master, to state and report the amount due on the two mortgages, and the rents and profits which have, or might have been received by the defendant W. G. D., and the value of the beneficial and permanent improvements now existing, and made by him thereon, and the injury, waste, and deterioration, which he may have committed, or suffered to be done, &c.<sup>1</sup> *Burnet v. Denniston*, 5 John. Ch. 43, 44.

(s.) *Another form of declaration that parties are not bona fide purchasers without notice.*

*Among other things.*] And this Court . . . doth further declare that said J. & M. are not *bona fide* purchasers, without notice, of the lands described in said bill, but did receive a conveyance thereof and do now hold the same with notice of and subject to the plaintiff's rights therein.<sup>2</sup>

(t.) *Redemption after tender; payment into Court; costs; costs, charges, and expenses.*

"Let the plaintiffs, H. &c., be at liberty, on or before, &c., to pay the sum of \$2000, unto, &c.; and let, upon such payment being made, the defendants P. &c., deliver up all deeds, &c.; and let an account be taken of what on the eighteenth day of March, 1853 [*date of tender*], was due to the defendants for principal and interest in respect of their mortgage security, &c., and for such (if any) costs, charges, and expenses as are secured thereby, or as they are entitled to, under their said mortgage security, such costs, charges, and expenses to be taxed, &c.; and if it shall appear, on taking the said account, that the amount due to the defendants for such principal, interest, and costs, charges, and expenses, on the said eighteenth day of March, 1853, did not exceed the sum of \$1900 [*the sum tendered*]," — Tax the plaintiffs' costs of suit, and amount to be deducted, and the balance remaining due to the defendants, for principal, interest, and costs, charges, and expenses, to be paid out of the said \$2000, when paid in, and thereupon defendants to reconvey, &c., and the residue of the \$2000, to be repaid to the plaintiffs; but if the plaintiffs shall not pay in the \$2000, upon the plaintiffs paying to the defendants the amount found due, within — months, &c., defendants to reconvey and deliver all deeds, &c., but, in default, the plaintiffs' bill to be dismissed, with costs; — "But in case it shall appear on taking such accounts that the amount due to the

<sup>1</sup> To authorize a recovery for waste in such a case it must be charged in the bill. *Gordon v. Hobart*, 2 Story, 243, 260, 261.

<sup>2</sup> *Pingree v. Coffin*, 12 Gray, 311.



defendants on the eighteenth day of March, 1853, did exceed the said sum \* of \$1900, let subsequent interest be computed from \* 2230 the said eighteenth day of March, 1853, and added to what shall appear to be due as aforesaid." And tax the defendants' costs of suit, and amount to be added; and what shall be certified to be due to be paid out of the \$2000, and the residue to the plaintiffs; or if the \$2000 is insufficient, the whole to be paid to the defendants in part-payment, and the balance to be paid by the plaintiffs; and thereupon defendants to reconvey, &c.; And in case the plaintiffs shall not pay in the \$2000, usual directions for redemption, or bill to be dismissed with costs. *Harmer v. Priestly*, 16 Beav. 569; 1 Seton Dec. (Eng. ed. 1862) 462.

*(u.) Chattels. Redemption of goods pledged; overpayment; assignee.*

It is ordered and decreed that it be referred to A. B., Esquire, Master, &c., to take an account of what remained due on the, &c., the date of the last note exhibited in this cause, for principal and interest of the money advanced and lent by the defendant W. to the said C., the bankrupt, on the pledge of the jewels, plate, and effects mentioned in the original note from the defendant to the said C., dated, &c., and to compute the interest on so much of the principal as then remained due. And it is further ordered, that the said Master do likewise take an account of the said jewels, plate, and effects, specified in the last-mentioned note, and see which of them remain in specie in the custody or power of the defendant, and what part thereof hath been sold or disposed of by the defendant. And as to such part thereof as hath been so sold or disposed of, it is further ordered, that the said Master do take an account of the real value thereof; and that the value of such part thereof as hath been so sold or disposed of by the defendant be applied in the first place towards paying the interest, and then towards sinking the principal, of what shall be so found to have been due to the defendant for the money lent or advanced by him as aforesaid. And if upon the balance of the said account, anything shall be found to remain due to the defendant for principal or interest, then on payment thereof by the plaintiff to the said defendant at such time and place as the said Master shall appoint, it is further ordered that the defendant do deliver to the plaintiff such part of the said jewels, plate, and effects as shall be found to remain in specie. But in default of such payment by the plaintiff to the defendant as aforesaid, it is further ordered that the said plaintiff's bill do from thenceforth stand dismissed out of this Court with costs to be taxed by the said Master. And in case it shall appear on the said account that the defendant is overpaid his said principal and interest, then it is further ordered that the said defendant do pay to the plaintiff so much as shall remain due to the plaintiff on the said account, and also to deliver to the plaintiff such part of the said jewels, plate, and effects \* as shall remain in specie, to be applied as part of the \* 2231 personal estate of the bankrupt, for the benefit of the creditors seeking relief under, &c. And the Court doth reserve the consideration of interest of any money that may be found due from the defendant to

the plaintiff, in case there shall be any such, and also the consideration of costs, till after the said Master shall have made his report. Liberty to apply.<sup>1</sup>

(c.) *Report of Master on a bill for redemption.*

In Chancery [*or*, Equity].

R. R. B. *et al.*

*v.*

J. McV. *et als.*

*Report.*

To the Honorable Judges of the Supreme Judicial Court.

In pursuance of a decretal order of this honorable Court, made in the above cause, and dated the — day of —, A. D. 18—, I, the subscriber, one of the Masters of this Court, having been attended at several times by counsel for the plaintiffs and for the defendants, and having examined the evidence taken in chief in this cause, and taken the testimony of several witnesses produced before me, upon the matters directed to be inquired into by such order, and considered the same, do report, —

That I have stated the account of the amounts due upon the two several bonds and mortgages mentioned in the said decree, and of the rents and profits of the mortgaged premises since the — day of —, 18—, received by the defendant W. G. D., or which with ordinary care and diligence might have been received by him, the particulars and items of which accounts appear in Schedule A hereto annexed and making part of this report; that, in computing the amount due upon said bonds and mortgages, I have stopped the interest upon the — day of —, 18—, the day of the tender made by some of the plaintiffs to W. G. D., of the amount due upon the said mortgages; conceiving that such tender was strictly made, and that the defendant had no reasonable cause for refusing to admit the redemption sought.

And I further report, that the plaintiffs have claimed for rent of the premises, since the — day of —, 18—, the annual sum of \$75, that the amount actually received has been the sum of \$70 annually, from

A. M. tenant in possession since that period; that it appears \* 2232 from the \* testimony of B. McV. that, in the month of —, 18—, he gave up the premises, but not being able to procure another place, offered to said W. G. D. \$75 a year rent to allow him to remain; that the premises were then let, or contracted to be let to A. M., and that said D. stated he would try to let him, the said McV., have them at the sum offered, and, afterwards, that he was unable to do it on

<sup>1</sup> Bill to redeem goods pledged. See *Kemp v. Westbrooke*, 1 Ves. Sr. 278; *Slade v. Rigg*, 3 Hare, 35. To recover surplus, overpaid. *Harrison v. Hart*, Com. Rep. 393. Upon payment or tender of amount for which goods are pledged, the property is at once reduced to the pledgor and they may be recovered by action. <sup>2</sup> *Spence*, 771. If no time be limited for re-

demption, pledgor may redeem at any time during his life. *Kemp v. Westbrooke*, 1 Ves. Sr. 278. Where the pledgee had sub-mortgaged by deposit, the original pledgor was entitled to redeem the goods, on paying the amount due on the original pledge. *Spalding v. Ruding*, 6 Beav. 376, 380.

account of his bargain with A. M.; that the first lease to said A. M. was for the period of three years; and that it does not appear that the said MeV., or any other person, at any subsequent time, renewed the offer of \$75 or any other sum beyond the said \$70 rent actually received, nor that any application was ever made to the said MeV. or to any other person by the said W. G. D. to take the premises at the said rent of \$75 or any other advance; that, from a consideration of the testimony upon that point, I am of opinion the sum of \$70 was a fair and adequate rent for the premises at that period, and has so remained to the present time; and that, under these circumstances, I have disallowed the claim of the said plaintiffs, not conceiving this a case in which a mortgagee in possession should be charged beyond the amount actually received on the ground of wilful default or defect of diligence.<sup>1</sup>

And as to such part of the decree as directs an account to be taken of the injury, waste, or deterioration of the mortgaged premises or in the value thereof, by W. G. D., or by those under him, I report, —

That I have taken the rule of Court to be that a mortgagee in possession is, in Equity, chargeable only for waste, technically so called, or wilful neglect, producing an injury and deterioration of the premises, but is not liable for a diminution of value which may be accounted for by the lapse of time merely.<sup>2</sup> And I find that the premises were, in the month of —, 18—, at the commencement of the possession by said W. G. D., in about the same situation, as to fences and buildings, as at present, that a considerable quantity of timber, young and old, was at that period upon the premises; that the whole of such timber has been cut down, and that the place is now entirely destitute of wood. But I find, from the testimony of several witnesses, that the quantity of wood upon the place would not have been sufficient to supply the ordinary consumption for firewood and repairs; that the young timber could not have been preserved if firewood was taken from the premises, and that a considerable quantity of wood has been taken from other pieces of land belonging to said W. G. D. for the consumption of the place, by his permission. Under these circumstances, I have found no reason to charge the said defendant with any sum of money on the ground of such destruction of the wood, nor, in my opinion, does the testimony supply any ground to charge the defendants by reason of any improper cultivation, or undue exhaustion of the farm.

\* And as to such part of the decree as directs the Master to \* 2233 take an account of the value of the beneficial and permanent improvements now existing, if any, which the said W. G. D. hath caused to be made upon the said mortgaged premises, I report, —

That I have taken the rules of the Court to be, that additional permanent improvements upon the premises, made by a mortgagee in possession, shall be paid for only by their value at the time of the redelivery of possession;<sup>1</sup> but that he shall be allowed the actual

<sup>1</sup> *Ante*, p. 1238-1240.

<sup>1</sup> *Ante*, p. 1243.

<sup>2</sup> *Ante*, p. 1240.

costs of necessary repairs, whatever may be the existing value of the subject upon which they were made;<sup>2</sup> and that the allowance of the same is to be determined by their necessity for the preservation of the premises in the same condition, or the producing of the rent charged to the mortgagee;

And, further, that I have not considered the omission of the decree to provide for an allowance for necessary repairs as precluding me from making it, according to their cost. And having examined the testimony as to the expenditures of the said W. G. D., and work performed by him upon the premises, with a view to these rules, I find that at an early period of the possession of B. McV. as tenant of said D., and as it appears, during the first year, the said D. employed said McV. to build about fifty rods of stone fence upon the premises, and allowed him fifty cents a rod for the same, and that the amount was credited upon the rent payable by said McV., and such price allowed appears to have been reasonable; that at that time the fences were in a decayed condition, and that such piece of stone fence is at the present time considerably sunken and out of repair, and the premises, as to fences, are in about the same repair as when McV. took possession,—that consequently the allowance, if any, which could be made for the same, by its existing value as a permanent improvement, would be very trifling,—but that I have considered the same as a necessary expense for the repair of the premises, and as a cause of the increase of rent afterwards charged and actually received, and have therefore allowed the same.

And I further find and report that, during the first three years of the possession of A. M., as tenant of said D., after J. McV., and as it appears during the second year of such possession, the said D. built a small piece of stone wall upon the premises, stated by A. M. to have been between ten and twenty rods, and the cost of it was about the sum of five shillings a rod; that the same is now out of repair and in a decayed condition: but that I have allowed its actual cost, conceiving it a necessary repair;

And, further, that it appears that the said A. M. has advanced the money for the payment of taxes upon the premises, and receipts \* 2234 were \* taken to himself; that he has stated in his testimony that he is to be allowed for the same by W. G. D., the leases to him not containing any covenant for the payment of the same by himself, and that there is an unsettled account between himself and said D.; and that I have allowed the amount of such taxes to said D., so far as any proof of payment has been produced to me.

And I further report that I have considered the defendant W. G. D., previous to the —day of —, 18—, as a creditor, by the bonds and mortgages held by him, and by his disbursements on the premises, receiving partial payments in liquidation of his claim by means of the rents and profits; that I have not allowed interest upon the rents up to that time, nor upon the disbursements of the defendant W. G.

<sup>2</sup> *Ante*, p. 1242.

D.; and interest upon the bonds and mortgages being stopped previous to the commencement of the reception of the rents, such partial payments have gone in extinction of a dead sum; and therefore I have not found it necessary to make any rest in the account before such last-mentioned date.

And I find that on the said — day of —, 18—, the total of the rents received had fully discharged the total amount in any manner due to the said W. G. D., according to the allowances made by me, and that there was a balance then in his hands of \$—; that from that time I have considered the said defendant, W. G. D., as becoming a naked trustee, retaining moneys in his hands, which the plaintiffs were entitled to receive, and therefore chargeable with interest on his annual balances. And I have stated the residue of the accounts with annual rests, and in Schedule B to this report annexed have stated an account of interest upon the annual balances, the total amount of which balances is the sum of \$—, and of interest \$—, making together the sum of \$—, which sum I report chargeable to the defendant W. G. D.

All of which I respectfully submit.

(w.) *Objections to draft of Master's report.*

In Chancery [*or, Equity*].

R. R. B. *et al.* }  
*v.* }  
 I. McV. *et als.* }

Objections taken by the defendants to the draft of the report in this cause, prepared by M. H., Esq., the Master to whom this cause stands referred.

*1st Objection.* For that, in the computation of the interest due upon the bonds and mortgages mentioned in the report, the Master has stopped the interest on the — day of —, 18—, which ought to have been allowed to this time according to the decree, and at the \* same time the Master has charged the defendant W. G. D. \* 2235 with the whole rents and profits of the premises in question down to the time of making his report.

*2d Objection.* For that an allowance ought to have been made to the defendant W. G. D. for the value of the firewood furnished by him to the tenants in possession, or a deduction on that account ought to have been made from the rents with which he is charged by the said report.

*3d Objection.* For that allowance ought to have been made for a greater quantity of stone fence built on the premises, and for rails brought thereon from other premises or procured by the defendant W. G. D. according to the evidence before the Master.

*4th Objection.* For that the defendant W. G. D. is charged by the report with interest on the annual balances of the moneys received, or which are charged to him for what he might have received for the said

rents, when in fact such rents have not been annually received, and if so calculated, compound interest will in effect be charged against him, when at the same time no interest whatever is allowed on the debts or demands due on the said bonds and mortgages after the — day of —, 18—, and also for that no interest is allowed on the sums credited to the said W. G. D. for the additional building, and the stone wall, and other fences, and improvements made or caused to be made by him on the premises.

J. R., *Solicitor*.

These objections were turned into exceptions, and overruled.

## 21. PARTNERSHIP.

### *Enforcing or setting aside agreement.*

#### *(a.) Decree enforcing partnership agreement with variations.*

The Court doth “declare, that the agreement for a copartnership in the pleadings of this cause mentioned, dated, &c., is a binding agreement between the parties thereto, and ought to be specifically performed and carried into execution; and decree the same accordingly; and it is ordered that the Master do inquire whether any, and what, variations have been made in the said agreement, by and with the assent of the several parties thereto, since the date thereof; And it is further ordered that a proper deed of copartnership between the said parties, in pursuance of the said agreement, be settled by the Master in case the parties differ; And in settling such deed, the Master is to have regard to any variations which may appear to have been  
\* 2236 made in \* the said agreement on the result of the inquiry hereinbefore directed; And it is further ordered that such deed of copartnership, when agreed upon between the said parties, or when so settled, be executed by the several parties thereto.” Directions as to costs. Injunction continued. *England v. Curling*, 8 Beav. 140; 1 Seton Dec. (Eng. ed. 1862) 540.

#### *(b.) Setting aside partnership induced by misrepresentation; consequent relief.*

This Court doth “declare, that the partnership entered into by deed, dated, &c., set forth in the plaintiff’s bill in the first-mentioned cause, is void and invalid as between the parties thereto, and that the said deed ought to be set aside; and doth order and decree the same accordingly; And it is further ordered that the said partnership deed be cancelled; And the Court doth further declare, that the defendant B., and the estate of W., deceased, in the pleadings, &c., mentioned, are bound to pay to the plaintiff the sum of \$—, paid by him as a consideration for a share in the said partnership business, with interest thereon, at the rate of — per cent per annum from the — day of —, the date of the said articles of partnership, down to the time

of the repayment thereof; and the Court doth further declare, that the defendant B., and the estate of the said W., deceased, are bound to indemnify the plaintiff against the outstanding debts, sums of money, and liabilities which the plaintiff has, or may become subject and liable to pay, for, or on account, or in respect of the dealings and transactions of the said alleged partnership, or relating thereto. And the Court doth order and decree that it be referred to A. B., Esq., one of the Masters, &c., to take the following accounts; that is to say: 1. An account of such outstanding debts, sums of money, and liabilities; 2. An account of what is due to the plaintiff in respect of the said sum of \$—— and interest; 3. An account of all sums of money which the plaintiff has already paid for or in respect of the debts, liabilities, dealings, and transactions of the said partnership, with interest thereon, at the rate of —— per cent per annum, from the respective times the same were advanced or paid by the plaintiff; and in taking such account the plaintiff is to give credit for all moneys drawn by him on account of the profits of the said partnership business, with interest thereon, at the rate of —— per cent per annum, from the respective times the same were drawn out; and the defendants J. W., &c., the executors of the said W., deceased, not admitting assets of the said W. sufficient to answer and satisfy what may be due to the plaintiff on taking the accounts hereinbefore directed, it is ordered that the plaintiff be at liberty to go in under the decree made in the cause of *G. v. W.*, dated, &c., to prove for what shall be found to be due to him on taking the said accounts.” Receiver continued; \*and \*2237 to pay balance and pass accounts as directed by former order; defendant B. to pay plaintiff’s costs of suit. Adjourn, &c. *Rawlins v. Wickham*, 1 Seton Dec. (Eng. ed. 1862) 541; 3 D. & J. 304; 7 W. R. 145.

(c.) *Partnership held still existing; sale as a going concern.*

“This Court being of opinion that the memorandum of the —— day of —— in the bill mentioned, and the subsequent dealings of the parties, did not constitute an agreement on the part of the plaintiff for the sale of the plaintiff’s share and interest in the L. concern in the pleadings mentioned.” Decree for usual partnership accounts, and the said L. works to be sold as a going concern, with the approbation of the Master, &c. 1 Seton Dec. (Eng. ed. 1862) 541.

(d.) *Inquiry as to existence of partnership.*<sup>1</sup>

It is ordered that the Master do inquire whether or not there was any, and what, partnership existing between G., deceased, in the pleadings named, and the defendant, and if so, when the same commenced, and whether the same ever, and when, determined, and under what circumstances. Adjourn, &c. 1 Seton Dec. 541.

<sup>1</sup> For a form of decree declaring the existence of a partnership and the rights of a joint creditor against the partnership effects, when

one partner has absconded and the other not, — also directing an account, — see *Robbins v. Cooper*, 6 John. Ch. 186, 192, 193.

(e.) *Account ; sale ; dissolution.*<sup>2</sup>*Decree for account of dealings and transactions.*

The Court doth order and decree that it be referred, &c., to take an account of all partnership dealings and transactions between the plaintiff and the defendant (from the — day of —); and that what, upon taking the said accounts, shall appear to be due from either of the said parties to the other of them, be (within one month from the date of the Master's report) paid by the party from whom, to the party to whom, the same shall be certified to be due [*or*, adjourn further consideration, &c.]. Liberty to apply. 2 Lindley Partn. (Eng. ed. 1860) 828; see also *id.* for the method of taking an account under such decree. [Hart v. Clarke, 6 De G. M. & G. 254.]

(f.) *House, &c., where business was carried on declared partnership assets ; sale and accounts ; Receiver.*

This Court doth declare, that the leasehold house, &c., at, &c., in the plaintiff's bill mentioned, and comprised in the indenture of lease, dated, &c., and in the indenture of assignment, dated, &c., and \* 2238 wherein \* the partnership between the plaintiff and the defendant has been carried on, are assets of the said partnership; and it is ordered that the said leasehold property, together with the trade-fittings and fixtures thereon, be sold with the approbation, of, &c.; money to be paid into Court; account of partnership dealings and transactions. Adjourn, &c. Liberty to apply in Chambers for Receiver. Raiker v. Pike, 1 Seton Dec. (Eng. ed. 1862) 543.

(g.) *Decree for dissolution from time of notice ; renewed leases ; partnership assets ; accounts ; inquiry as to most beneficial mode of sale, and if as a going concern, or as wound up ; sale.*

This Court doth "declare, that the partnership in the pleadings of their causes mentioned, called the — Co., is to be deemed dissolved as from the — day of —, the date of the notice of dissolution given by Messrs. —, as the solicitors and on behalf of the defendants F. and M., as in the pleadings mentioned [*or*, as from the — day of —, the date of the filing of the plaintiff's bill in this cause; and doth order and decree the same accordingly]; And the Court doth further declare, that the renewed leases of the freehold mines, lands, and premises, in such leases respectively comprised, granted by, &c., the respective lessors, to the defendants, dated respectively, &c., are, in Equity, assets of the said partnership firm; And the Court doth order and decree that it be referred, &c., to take and make the following account and inquiry; that is to say: 1. An account of the partnership dealings between, &c., all severally deceased, and the plaintiff and defendants respectively, since the grant by, &c., of the lease, dated, &c., and including in such account dealings with the partnership assets, property, and estates, since the

<sup>2</sup> If the defendant's answer consents to the dissolution of a partnership prayed for in the plaintiff's bill, distribution of the assets may

be decreed without a formal decree of dissolution or proof of the special grounds alleged in the bill. Burns v. Rosenstein, 135 U. S. 449.



date of the dissolution; 2. An inquiry, of what the partnership estates, property, and effects now consist, and in what manner, and upon what terms and conditions the same may be sold most beneficially for all parties interested therein; and whether as a going concern, or as one finally wound up; And it is ordered that the said partnership estate, property, and effects be sold with the approbation of the Master [*or, Court, or, Judge*] in such manner, and upon such terms and conditions as shall appear to be most beneficial for the parties interested therein." Receiver. Adjourn, &c. 1 Seton Dec. (Eng. ed. 1862) 544, 545.

\* (*h.*) *Account of partnership assets on bill by creditor; one partner deceased, survivors bankrupt; inquiry, if deceased's estate was released.* \* 2239

The Court doth order and decree that the following accounts and inquiries be taken and made; that is to say: 1. An account of what was due at the time of the death of D., deceased, from the partnership of D., &c. (*surviving partners*), to the plaintiff B. and to S. respectively; and also what was due to all such other persons as were creditors of the partnership of D. & Co., at the time of the death of the said D.; 2. An account of what is now due from the said partnership to the plaintiff B. and to S. respectively, and to all such other persons as were creditors of the said partnership at the time of the death of D.; 3. An inquiry, whether the said plaintiffs and creditors, or any and which of them, continued to deal with the said, &c. (*survivors*), after the death of the said D.; 4. An inquiry what sum or sums of money was or were paid by the said surviving partners to the plaintiffs and creditors respectively, from the death of D. to the bankruptcy [*or, insolvency*] of the said surviving partners, and what has been since received by the plaintiffs and creditors respectively; 5. An inquiry whether the said plaintiffs and creditors, or any and which of them, have by such subsequent dealing released the estate of D. from the payment of their respective debts, or what, if anything, remains due in respect thereof. Adjourn, &c. 1 Seton Dec. (Eng. ed. 1862) 550.

(*i.*) *Same; against administrators of deceased partner, and surviving partner.*

"Ordered, that it be referred to one of the Masters, &c., to take and state an account of what may be due to the plaintiffs upon their demand, stated in the bill, and to all other the creditors of the intestate from him, at the time of his death, either in his individual character, or as a partner of the house of B. & F., in the pleadings mentioned; and whether by judgment, mortgage, or otherwise, and the Master is to cause reasonable notice to be given, in his discretion, either personally or inserted in such public paper or papers as he may deem proper, for the said creditors to come in before him and prove their debts; and he shall fix a peremptory day for that purpose, and such of them who shall not come in and prove their debts by the time so to be limited, shall be excluded from the benefit of this decree; and such persons, not parties to this suit, who

shall come in before the said Master to prove their debts are, before they be admitted creditors, to contribute to the plaintiffs their proportion of the expenses of this suit, to be settled by the said Master.

\* 2240 \* And it is further ordered, that the Master take an account of the personal estate of the intestate, which hath come to the hands of the defendants (administrators), or to the hands of any other person by their order or for their use.

“And it is hereby ordered, by way of special directions to the said Master, that in taking such accounts, the administrators be not charged with any loss sustained by the act of the defendant F. on the undivided moiety belonging to the intestate, of the goods, chattels, and credits of the said firm of B. & F. in possession of F., by the administrators, and which undivided moiety is stated, in their answer, to have been of the value of 3,601 dollars and 45 cents.

“And it is further ordered, that the administrators be charged with the amount, without interest, of assets, being in money and stock, or chattels, and amounting to 665 dollars and 76 cents, and put into the possession of F. by them, as part of the partnership stock between them, and that they likewise be charged with the amount in value of goods received by them upon the insolvency of F. from the said partnership stock, and stated by them to be of the value of 491 dollars; and that they likewise be charged with the amount in value of assets admitted to be in hand unsold, and stated by them to be of the value of 500 dollars, and that they be charged with moneys received from the debts of the continued partnership formed between them and the said F., and stated by them to amount to 268 dollars.

“And it is further ordered, that they be credited with the debts of the partnership of B. & F., for which they have made themselves personally liable, as and for so much money paid by them in a course of administration, and which said debts, with the interest and costs thereon, are estimated by them to amount to 1583 dollars and 75 cents.

“And it is further ordered, in addition to these special directions, that the administrators be charged with all other assets which may have come to their hands, or to the hands of any other person for their use, and be credited with all other payments and dispositions thereof, by them made in a due course of administration.

“And it is further ordered, that the said Master make all just allowances to the said administrators for costs and expenses, but that no allowance be made, under the special circumstances of this case, by way of compensation for their time and trouble.

“And it is further ordered, that the said Master also state an account of the location, quantity, and value of the real estate of the intestate, whereof he died seised, and of the amount of the incumbrances thereon; that the Master report in the premises with all convenient speed, and that he report specially on any point, or apply for further directions, if he should deem it proper.

\* 2241 “And it is further ordered and declared that the balance of the said \* personal estate that shall, upon such accounting, be found to be remaining in the hands of the administrators unadminis-

tered, be applied, in the first place, to pay and satisfy judgment debts against the said estate, according to their respective priorities in point of time; and if any assets shall then remain unadministered, that the same be applied to pay the plaintiffs, and all other creditors, if any, who shall have come in under this decree, and proved their debts before the said Master; and if not sufficient to pay all of them, including their costs, then in ratable proportions, according to their respective amounts, and without any preferences or regard to legal priorities.

"And it is further ordered, that if any proportion of the debts, and the costs and charges thereon, shall still remain unsatisfied, the plaintiff, or any other of the creditors who shall have so come in under this decree, shall be at liberty to apply to this Court, on the foot of this decree, for a sale of the real estate of the intestate, and that the proceeds arising from such sale be applied to satisfy the proportions of debts that shall remain due, but that all legal incumbrances upon such real estate shall have preference.

"And it is further declared, that the right of application, on the part of either of the parties to this suit, for an injunction if requisite to stay proceedings on the part of any creditor at Law, either in respect to the personal or real estate, or to stay proceedings on any mortgage upon the said real estate, is left open. And all other and further directions and questions are reserved."

*(j.) Account on bill by party interested under will.*

*Accounts and inquiries as to testator's partnership business.*

Usual accounts of testator's personal estate. "And it is ordered that the said Master do inquire what was the amount of the testator's capital, stock in trade, credits, debts, and liabilities in the partnership trade, or business of a wholesale dealer in, &c., in the pleadings mentioned, on the footing of the deed of, &c.; and whether any, and which, of the debts due to the said partnership at the date of the said deed remain unpaid, and under what circumstances, and whether any, and what steps ought to be taken for recovering the same; and what is the present amount of the capital, and of the credits, debts, and liabilities of the said business, and how such capital has been derived; and it is ordered that the said Master do take an account of the business, and of the profits and losses thereof, in each year since the testator's death." Any settled account not to be disturbed; defendant P. P. (*executor*) to be charged with all moneys received by him; and be allowed all sums properly paid by him to J. H. (*agent*), for carrying on the business under the will, and having regard to its terms. And \* that \* 2242 the said Master do also "inquire what sums of money have been paid by the defendant P. P. to the defendant J. P., or to any other person, &c., according to the terms of the testator's will; and whether it will be fit and proper, and for the benefit of the infant plaintiff, that the said business should be carried on, and in what manner and upon what terms." (And let such steps be taken respecting the recovery of the

testator's debts and the said business as the Court [*or*, Judge] shall direct.) 1 Seton Dec. (Eng. ed. 1862) 553.

(k.) *Decree requiring surviving partner, who has retained the capital stock of the firm and employed it in trade to account for the profits derived from it, proper allowances being made for managing the business.*

It was ordered that it be referred to, &c., to inquire whether the concerns of the firm, as they stood at the death of M., were in any manner and how kept separate and distinct from the concerns of the firm that was carried on after his death, and whether the concerns of the new firm were in any manner, and how and to what extent, aided or supplied from the concerns of the old firm; and it was declared that the shares of profits which, after the death of M., were paid by De T., the defendant, to the junior partners of the concern, were to be considered as in the nature of wages, and to be allowed to De T. in discharge of the account of the profits of the concern; and the Master was to inquire what would be a reasonable compensation to De T. for his personal attention and credit, which was also to be allowed to him. Upon appeal this decree was affirmed, with liberty for the defendant De T., in the proceedings before the Master, to submit to the judgment of the Master any claims as just allowances which he may be advised ought justly to be made to him, by reason or on account of the management, transacting, and carrying on the business or concern, at any period or periods by them the said De T., M., De P., and F. G., or any of them, or by them the said M., De P., and F. G., or either of them, or any other person or persons: "and it is ordered, that the said Master do state in his report the facts and reasons upon which he shall have adjudged any allowances to be just allowances, if on the behalf of the plaintiff he shall be requested so to do, and state the facts and reasons upon which he shall have adjudged any allowances prayed not to be just allowances, if he shall be requested on the behalf of the said defendant to make such statements." Affirmed on appeal to the House of Lords. *Brown v. De Tastet, Jacob*, 284.

\* 2243 \* *Estates purchased with partnership funds distinctly traced, but conveyed to and occupied by one partner, since deceased, declared partnership property; sale decreed to pay off heirs, copartnership debts, and copartnership, balance to surviving partner. Estates to be separately sold; separate accounts to be kept by Master; any of the parties at liberty to bid; account of copartnership affairs to be taken, and of what debts remain unpaid, and of the copartnership assets uncollected, &c.; account of rents received and value of occupation rent, of repairs, taxes, and insurance, and of liens on the estates; confirmation of report, certain persons allowed as purchasers, and let into possession; decree release as to infants; distribution of proceeds; costs out of the fund.*

Circuit Court of U. States, }  
District of Massachusetts. } In Equity.

This cause came on to be heard at this term on the pleadings and evidence therein, and was argued by counsel as well for the defendants as

for the plaintiff, and thereupon upon consideration thereof, the Court doth now adjudge and declare it to be well proved that the plaintiff and said O. H. deceased, were copartners in business under the firm of H. & K. in manner and form as stated in the bill, and that said copartnership was dissolved on the twenty-second day of December, A. D. 1841, by the death of the said O. H. ; that the said land in C. Square, and the said land in C. Street, mentioned in the bill, were purchased and the said building upon the land in C. Square was built by said firm out of and with their copartnership funds and for their copartnership uses and purposes ; — that the said two parcels of real estate were originally and always held, managed, and intended by the plaintiff and said O. H. as part of their joint copartnership stock, and that the same do now constitute a part of the stock and assets of said late firm ; that the said land and dwelling-house near B. Street mentioned in the bill were bought and built by said O. H., with and out of the copartnership funds withdrawn and applied by him to that purpose, secretly and without the knowledge or consent of the plaintiff ; that the said appropriation of the copartnership funds to that purpose by said O. H., was a fraudulent appropriation and investment thereof by him in his own name, and that the said dwelling-house and land near B. Street ought therefore to be deemed, and is hereby declared, to be part of the copartnership stock and property of said late firm ; — that said E. D., deceased, when he took his conveyance of said B. Street estate in mortgage from said O. H., had no notice of the said fraud, and was a *bona fide* mortgagee thereof, and his administrator, said E. E. D., one of the defendants, is entitled to the extent of said mortgage to be protected and to have priority of right of payment out of said B. Street estate. But that neither the widow, nor the heirs, nor the administrator, nor \* the private \* 2244 creditors of said O. H., are entitled to any such protection or priority. And it is further considered and adjudged by the Court that the said estate near B. Street, as well as said estate on C. Square and said estate on C. Street, ought to be sold, under the direction of the Court, by a Master, and the proceeds brought into Court, first to apply so much thereof as is necessary to discharge the mortgages thereon, and to apply the residue thereof to the discharge of the debts of the copartnership and the copartnership balance that may be found due to the surviving partner. And the Court doth further order and decree, that it be referred to G. T. C., Esquire, one of the Masters of this Court, to cause the said parcel of real estate in C. Square, and the said parcel of real estate in C. Street, and the said parcel of real estate near B. Street, to be separately sold with the approbation of the said Master at such times and places as he shall think fit, to the best purchaser or purchasers that can be got for the same to be allowed of by the said Master, wherein all proper parties are to join as the said Master shall direct. And any of the parties are to be at liberty to bid at said sales for all or any of said estates. And it appearing to the Court that said estates in C. Square and near B. Street are incumbered by mortgages or other liens, the said Master is directed to keep and state his accounts so that it may appear by his report what are the proceeds of each of said parcels of real estate. And the Court doth

further order and decree, that it be referred to the same Master to take and state an account of the partnership debts and credits at the time of the death of said O. H., and of all subsequent receipts, payments, and disbursements, by the surviving partner on the copartnership account, or in liquidation of its affairs and of the balance due from said O. H. to the plaintiff on the copartnership account. And the said Master is also to inquire and report what copartnership debts, if any, still remain unpaid by the surviving partner, and what copartnership assets, if any, still remain uncollected or unadministered, and the value thereof. And the said Master is also to take an account of all rents and sums of money, or other things of value received by said O. H. in his lifetime, or by his administrator, widow, or heirs, since his decease, for the occupation of said estate near B. Street, or which without the wilful default or neglect of him or them might have been received therefrom, and if the said estate or any part thereof has been occupied by said O. H. in his lifetime, or by his said widow, or heirs, or administrators, since his decease, to fix and report a just occupation rent therefor, and also to take an account of all sums which had been paid by said O. H. in his lifetime, or by any of the parties since his decease, for necessary repairs, taxes, or insurance upon said B. Street estate, or an account of the said mortgages thereon. And the Master is to be at liberty to state any special circumstances. And for the better discovery of the

matters aforesaid, the said Master may examine either party on \* 2245 oath, and may require \* the production of the partnership books of said late firm, and all documents and vouchers in the possession of either party touching the premises. And the Court doth reserve the consideration of all further directions until the coming in of the Master's report upon some of the matters herein referred to him, unless either of the parties shall in the mean time apply for further directions, which they are at liberty to do, if occasion shall require.

*Confirmation of Master's Report.*] The report of G. T. C., Esq., the Master to whom it was heretofore referred, by a decree passed in this cause, to sell the three certain parcels of real estate, and also to take and state the accounts in said decree mentioned, having come in and been filed in the clerk's office on the first day of this term, and no exception having been taken thereto; on motion of Mr. English, the plaintiff's solicitor, it is ordered and decreed that said report do stand confirmed, and that the said M. K. be allowed as the purchaser of said parcel of real estate in C. Square, and of said estate near B. Street, and said J. L. be allowed as the purchaser of said parcel of land in C. Street, at the prices of said estates respectively reported by said Master as the highest bidder therefor.

*Final Decree.*] This cause came on to be further heard at this term for directions as to the final decree, and was argued by counsel, and thereupon upon consideration thereof, it was ordered, adjudged, and decreed, that the report of G. T. C., Esq., the Master to whom it was referred to convey the estates sold under the authority of a former

decree in this cause, which report was filed in the clerk's office on the seventeenth day of July, A. D. 1845, do stand confirmed; and the said M. K. be let into possession of the said estate on C. Square, and the said estate near B. Street; and said J. L. be let into possession of the said estate on C. Street. And it is further ordered, that the said defendants H. O. H., and S. S. H., respectively do as and when they shall respectively attain the age of twenty-one years, execute, acknowledge, and deliver sufficient deeds of release of the said estates in C. Square, and near B. Street, to said M. K., his heirs or assigns, and of the said estate in C. Street, to J. L., his heirs or assigns, unless the said H. O. H. and S. S. H. respectively shall, within six months after they shall have respectively attained said age of twenty-one years, show unto this Court good cause to the contrary; and in the mean time it is ordered, that the said purchasers of said estates, and their respective heirs and assigns, do hold and enjoy the said estates by them respectively purchased, and to them respectively conveyed by said deeds of said Master. And the Court doth further order, that the proceeds of said estates now in Court be paid out of Court to the plaintiff or his solicitor, less the fees of the Master, which have been already paid out to \* him, — the accountable receipts of the plain- \* 2246 tiff delivered into Court by him pursuant to a former decree to be delivered back and paid to, and taken by him as money, and that said defendant T. G. do forthwith pay to the plaintiff or his solicitor the said sum of one hundred and ninety-seven dollars and fifty cents found and reported to be due from him to the plaintiff by the first report of the Master, the said plaintiff agreeing to remit ninety-seven dollars and fifty cents thereof to said T. G. And touching the costs, the plaintiff is to recover his costs against the estate of said O. H., deceased, and the same are to be paid to him or his solicitor by the said administrator, widow, and heirs of said O. H., deceased, out of any the goods or estate of said deceased, which may now be in, or may hereafter come to, the hands or possession of them or any of them other or farther than such personal property of the said deceased as may have been allowed to said widow before the filing of this bill, by the decree of the Judge of Probate for the county of M., where said deceased last resided. But as between the plaintiff and the said administrator, widow and heirs personally, and as between the plaintiff and the other defendants, the Court doth not think fit to give any costs.<sup>1</sup>

(l.) *Partnership realty to be deemed personalty.*

This Court doth declare, that the estates appearing by the Master's report [*or*, the said certificate] to have been purchased on account of the partnership, and out of the funds and effects thereof, did form, and are to be considered as part of, the capital and effects of the partnership, at the time of the decease of the testator, and that the testator's interest in the said estates, and such other real estates, if any, as formed part of the capital and effects of the partnership at the time of his decease, are

<sup>1</sup> Kelley v. Greenleaf, 3 Story, 93.

to be considered in equity personal estate of the testator. *Phillips v. Phillips*, 1 My. & K. 649; 1 Seton Dec. (Eng. ed. 1862) 555.

(m.) *Inquiry whether dissolution beneficial for infants.*

The defendants, the executors, by their counsel, declining to carry on the testator's trade of, &c., it is ordered that the Master do inquire, whether it be for the benefit of the plaintiffs (*the infants*) that the terms offered by the defendant S. for dissolving the partnership in the pleadings mentioned should be accepted, or that such partnership should be dissolved on any and what other terms.<sup>2</sup> 1 Seton Dec. (Eng. ed. 1862) 556.

\* 2247 \* (n.) *Infants declared entitled to profits against survivor, also executor inquiry; if for their benefit to take profits or interest.*

This Court doth declare that the plaintiff E. B., and the defendants, the infants, are entitled to an account of the profits made since the death of the testator in the trade carried on in his lifetime by him and the defendant R. B., as partners, and which, since his death, has been carried on by the said defendant R. B. And the Court doth order that it be referred to A. B., one of, &c., to take an account of the profits of such trade, and of the value of the stock and effects therein, and of what such stock and effects consisted; and that the said Master do inquire whether it would be more for the benefit of the plaintiff E. B., and the defendant G. B., to take the testator's share of the said stock in trade, or to accept the sum of \$—, with interest, as calculated by the report, dated, &c. 1 Seton Dec. (Eng. ed. 1862) 556, 557.

## 22. ACCOUNTS AS TO SHIPS.

(a.) *Decree for account of ship and cargo. Inquiries as to sale between part-owners.*

It is ordered, that it be referred to A. B., one of, &c., to take the account and make the inquiries following, that is to say: 1. An account of all dealings and transactions between the plaintiff and defendant relating to the ship B., and the cargo on board the same, and of all sums of money received and paid by the said parties or either of them, on account thereof; 2. An inquiry, what is become of the said cargo and by whom, and for what, the same has been sold, and how much has been received by the said parties or either of them, under an agreement or agreements made between them in relation thereto; 3. An inquiry, whether any and what sale or sales hath or have been at any time or times, and when, made of the said ship, or any or what part or parts thereof, and to and by whom, and for what price or prices respectively; 4. An inquiry, whether such sale or sales was or were a real fair sale or sales, or not, and if not, then what was the value of the said

<sup>2</sup> The Court of Chancery may appoint a person to carry on trade for an infant partner. *Thompson v. Brown*, 4 John. Ch. 619.



ship, and a fair and reasonable price to be given for the purchase thereof at the time of such sale or sales, or of such pretended sale or sales thereof; and what is become of the said ship, and in whose custody or possession the same now is, and ever since hath been. Adjourn, &c. 1 Seton Dec. (Eng. ed. 1862) 559.

\* (b.) *Decree for general account as to a ship.* \* 2248

The bill was by some part-owners against the managing owner and other part-owners, or their representatives.

It is ordered, that the said Master do take "an account of all dealings and transactions between the plaintiff and the defendants, relating to the ship or vessel called the J—, in the pleadings mentioned, and of all sums which have been received and properly expended by the defendant M. in respect thereof;" any account settled between the parties, or those interested for the time being, not to be disturbed. Adjourn, &c. 1 Seton Dec. 549.

(c.) *Accounts of shares and earnings, and proceeds if sold.*

This Court doth order that it be referred to A. B., Esq., one of, &c., to take an account of the several shares of ships contained in the assignment, dated, &c., and of the earnings and produce of such shares. And if the same or any of them remain in specie in the custody or power of the defendant, the same is to be sold with the approbation, &c.; but if the same or any part thereof have been sold, the said Master is to charge the defendant with the earnings thereof at the time of such sale and with the value thereof from the time of such sale; 3. And the said Master is to compute interest on the money arising by such earnings and sale at the rate of, &c. 1 Seton Dec. 559, 560.

(d.) *Decree for account of freight and earnings.*

On bill by two of the part-owners, against the managing and other part-owners.

This Court doth order that it be referred to A. B., Esq., one of, &c., to take the following accounts, that is to say: 1. An account of all sums of money which have arisen from the freight of the ship— and the profits made by the said ship, or otherwise, on account of the said ship during her voyage to J., and thence back to L., and of the several sums of money received by the defendant D., or by any other person on account of such freight and profits; 2. An account of the several sums of money expended on the outfit of the said ship, and of the expenses incurred during the voyage; 3. An account of the clear profits which have arisen from the said ship since the plaintiffs became part-owners thereof. Adjourn, &c. 1 Seton Dec. 560, 561.

*Contribution ; indemnity ; original decree.**(a.) Between co-sureties and principal, in suit by surety.*

Plaintiff's testator and defendant Wright were co-sureties for Watson, on whose default plaintiff's testator had been compelled to pay ; bill charged that Watson was insolvent, and prayed contribution.

This Court doth order and decree, that it be referred to A. B., Esq., one of, &c., to take an account of all sums of money paid by T. W., the testator in the pleadings named, and the plaintiffs, his executors, or either of them, agreeably to the undertaking in the pleadings mentioned, dated, &c., and compute interest on such sums of money, at the rate of, &c., from the times the several payments were made, and tax the plaintiffs' costs of this suit (cause) and it is further ordered, that the defendant G. Wright pay to the plaintiffs one moiety of what shall be found due for principal and interest as aforesaid, together with their costs of this suit (cause) when so taxed (within, &c.). And it is further ordered, that the defendant G. Watson (within, &c.) pay to the plaintiffs the other moiety of what shall be found due for principal and interest as aforesaid, and also pay to the defendant G. Wright the principal and interest before directed to be paid by him to the plaintiffs, together with the costs of the said defendant G. Wright, to be taxed, &c., and also the costs which he shall pay to the plaintiffs under the direction before given. Liberty to apply. 1 Seton Dec. (Eng. ed. 1862) 562.

*(b.) Account of payments by plaintiff as surety, and inquiry whether some of the co-sureties can contribute.*

This Court doth order and decree, that it be referred to A. B., Esq., one of, &c., to take the account and make the inquiry following, that is to say : 1. An account of all and every sum and sums of money which hath or have been paid by the plaintiff, as one of the sureties of the defendant W. G., as collector of taxes for the town of —, in the county of —, as in the bill mentioned ; 2. An inquiry, whether the defendant J., another of such sureties, is in such pecuniary circumstances that he can contribute towards the payment of the sums, if any, which have been paid by, or may be payable to, the sureties of the said defendant W. G., or either (any) of them ; but the said inquiry is to be without prejudice to any question between the plaintiff and the defendant J., or between the said defendant, and all or any of his co-defendants ; and the defendants S. and P. not desiring any inquiry whether the

\* 2250 \* defendant F. G. can contribute towards the payment of the said sums, the Court doth not think fit to direct such inquiry.

Adjourn, &c. 1 Seton Dec. 562, 563.

*Contribution ; indemnity ; further order.*

(c.) *One co-surety unable to pay his full share ; costs of resisting contribution.*

This Court doth order and decree, that “the defendants S. and P., as executors of F. S., one of the co-sureties, with the late plaintiff H., for the defendant W. G., as the collector, &c., under the several bonds, dated, &c., on or before the — day of —, pay to the plaintiffs T. and W., as executors of the said H., the sum of \$—, being one-fourth part of \$—, which is the aggregate amount of the sums amounting to \$—, paid by the said late plaintiff in satisfaction of the said bonds, and for the costs in the, &c., mentioned, and of \$— agreed upon as the amount of the interest on the same at the rate of, &c., from the respective times when the several principal sums were paid by the said H. ; and that the defendant Suter, another of such co-sureties, within the time aforesaid, pay to the said plaintiffs T. and W. the sum of \$—, being one other fourth part of the said sum of \$— ; and that the defendant J., another of such co-sureties, within the time aforesaid, pay to the plaintiffs T. and W. the sum of \$—, agreed to be paid by him ; and that the defendants S. and P., within the time aforesaid, pay to the plaintiffs T. and W. the sum of \$—, agreed to be paid by them in respect of the one-fourth share that ought to have been contributed by the defendant J—. Like direction as to the defendant Suter. And the Court doth further order, “that the defendant W. G., within the time aforesaid, repay to the plaintiffs T. and W. the sum of \$—, being the difference between the said sum of \$— and the sum of \$—, the amount of the several sums so to be paid to them as aforesaid, and also repay to the defendants S. P. Suter, and J., respectively, the several amounts that shall be paid by them to the plaintiffs, under the directions hereinbefore contained ; and the plaintiffs and the last-named defendants not asking any directions for contribution against the defendant F. G., another of such co-sureties, this Court does not think fit to direct such contribution. And this Court doth further order, that the defendants S. and P. and Suter pay to the said plaintiffs T. and W. so much of the costs of these suits (causes) up to this time as have been occasioned by their insisting that they were not liable to contribute any thing towards payment of the said sum of \$— ; but this Court does not think fit, under the circumstances of this case, to give any other costs on either side.” *Hitchman v. Stewart* (1855), 3 Drew. 271 ; 1 Seton Dec. 563.

\* (d.) *Between co-defendants, in suit by creditor.*

\* 2251

By the original decree, G. was to pay what on the account thereby directed should be found due from him to plaintiffs ; in default, W. and wife were to pay it, reserving how far they should stand in plaintiffs' place.

It appearing to the Court that the defendants W. and his wife have paid to the plaintiffs what was reported due to the plaintiffs by the

Master's report, dated, &c., for their demands and costs of this suit, the Court doth declare, that the defendant G. ought to indemnify the said defendants W. and wife, in respect of such payment, and to reimburse them what they have so paid; and the Court doth order, that the said defendants W. and wife be at liberty to prosecute the said decree against the said defendant G., in the names of the plaintiffs, in order to recover against the said defendant G., what they have so paid to the plaintiffs; and the defendants W. and wife are to be at liberty to make use of the names of the plaintiffs for that purpose, the said defendants W. and wife indemnifying the plaintiffs against any costs or damages they may be liable to on that account. 1 Seton Dec. 563, 564.

(c.) *Contribution to general average loss.*

U. S. C. C. }  
Mass. District. } May Term, 1855.

L. L. S. v. T. G. C.

This cause having been referred to W. P., Esquire, as a special Master in Chancery, to determine and report the amount which was due from the defendants, as owners of the cargo of the barque "Vernon," to the owners thereof as contribution, on account of the damages and expenses incurred in and by reason of the voluntary stranding of said vessel as alleged in said bill, the said Master having heard the parties, and their proofs, and what was alleged by their counsel, made a report which was duly presented to the Court, and to which the plaintiffs excepted, because the said Master had refused to allow to them a certain commission charged by them for services in attending to the adjustment and collection of the general average contribution; and the Court having heard the arguments of counsel on said exception, and considered the same, did order and decree that the said exception was well taken, and that the said report be recommitted to the said Master with directions to reform the same by allowing the commission aforesaid; and said report having been so recommitted and reformed, the said Master doth find and report, that there is due and owing from the said several defendants to the said plaintiffs the sums of money hereinafter mentioned, to wit: From the said T. G. C. the sum of \$——; from the said G. H. the sum of \* 2252 \$——; from the said P. C. \* the sum of \$——; from the said O. E. the sum of \$——; from the said G. and P. the sum of \$——; and from the several persons doing business under the firm of C. H. M. & Co. the sum of \$——; and that there is due from the plaintiffs to the said W. A. the sum of \$——; said sums of money including interest on the sums found to be due by the said Master from the date of the filing of said bill of complaint up to the date of August now current.

And said report being presented, and no exception taken or objection made thereto, it is ordered and decreed, that the same be accepted. And it is further ordered and decreed, that the said plaintiffs do recover from the said several defendants the sums of money from them respectively found to be due as aforesaid, and costs of suit to be taxed by the clerk,

and that executions issue therefore in due form of law. *Sturgis v. Cary*, 2 Curtis C. C. 382.

(f.) *Interlocutory decree*,<sup>1</sup> *declaring purchase of real estate on joint account of plaintiff and defendant, and not on sole account of defendant; right to redeem; bona fide purchaser without notice; plaintiff entitled to one-half the money received by defendant on sale of part of the estate; reference to Master to take an account.*

{ Date  
and  
Title.

This cause coming on to be heard upon the original and supplemental suit, before the Honorable Joseph Story, Associate Justice of the Supreme Court of the United States, and the Honorable John Davis, District Judge of the District aforesaid, at this present term, in the presence of the counsel on both sides; whereupon, and upon debate of the matter and hearing the defendants' answers, and the testimony and proofs taken and read in the said cause, and of what was alleged by the counsel on both sides,<sup>2</sup> the Court doth think fit, and doth declare, that here is full proof of the agreement of the said Flagg and Mann, that for the purchase of the right and title of the said Luther Richardson, and also for the purchase of the title of the Frye heirs, in the premises on joint account, as in the said bill is mentioned; and that the said agreement is now in full force, it never having been abandoned by the voluntary consent of both of the parties; and doth further declare that at the time of the said purchase from the said Luther Richardson by the said Flagg and Mann in the bill mentioned, the said Luther was

\* seised and possessed of an equity of redemption in the premises, \* 2253 and that the said Walker and Fisher were seised and possessed of the premises in mortgage, and not of an absolute irredeemable estate therein; and that the said Flagg and Mann became entitled to the equity of redemption of the same, under and in virtue of the purchase from the said Luther Richardson as aforesaid; and doth further declare, that the purchases subsequently made by the said Mann from Walker and Fisher, and from the Frye heirs, ought to be deemed in Equity as purchases for the joint account of the said Flagg and Mann, as in the said bill is mentioned, and not for the sole account of the said Mann; and that the said Flagg is, and ought now to be, entitled to the benefit of a moiety of the said purchases, he paying and allowing to the said Mann one moiety of the moneys paid, and costs and charges incurred in the same purchases; and doth further declare, that, inasmuch as the said Mann was, at the time of the sale of one moiety of the premises to the said Adams, fully and absolutely entitled to the said moiety, in his own right, that the conveyance to the said Adams is, and ought to be, deemed free from any equity of the said Flagg

<sup>1</sup> See another form of interlocutory decree in *Pingree v. Coffin*, 12 Gray, 311, 312.

<sup>2</sup> This decree was passed before the U. S.

Rules of January term, 1842, were promulgated by the Supreme Court. Rule 86 prescribes a more concise form.

therein; but that the said Adams is not, under all the circumstances, entitled to any costs. And doth further declare, that the said Fuller is, and ought to be, deemed a *bona fide* purchaser for a valuable consideration, without notice of the equity of the said Flagg in the other remaining moiety of the premises, and therefore is entitled to hold the same free of any equity claim and lien of the said Flagg therein, except as to so much of the purchase-money as was unpaid, when he, the said Fuller, had full notice of the said Flagg's equity and claim to the premises, as the same equity and claim are affected in the bill; for all which it is hereby declared, that there is a lien on the premises for the benefit of the said Flagg; and doth further declare, that the said Mann, in the said sale of the premises to the said Fuller, as is in the bill mentioned, without the knowledge or consent of the said Flagg, was guilty of a wrong and constructive fraud upon the rights and equity of the said Flagg, in the premises, and that, therefore, the said Mann is primarily liable to pay over to the said Flagg one moiety of all the purchase-money, for which the premises were sold, after deducting therefrom one moiety of the several sums paid by him to the said Walker and Fisher, and to the Frye heirs, for the purchase, assignment, and extinguishment of the interest, rights, and title to the premises, and all expenses incident thereto; together with interest upon the same moiety of the same purchase-money, from the time when the same was received; if the Master shall, under all the circumstances, report any to be due. And the Court doth order and decree, that it be referred to C. S., Esq., appointed a Master for this purpose, to take an account of all the moneys received and paid, and expended in the premises; \* 2254 and especially to take an account of all the moneys paid \* by the said Mann, for the purchases aforesaid, and the expenses incident thereto; and also of all the moneys paid by the said Fuller to the said Mann, and the times when the same were paid, &c.; and whether, and at what time, he had notice of the said Flagg's equity and right in the premises, and what sums now remain due from the said Fuller. And the Master is also to report upon all other matters and things, which may be necessary and proper to carry into full effect this interlocutory decree, and especially in regard to interest, &c., &c. And all further orders and decrees are reserved for the further consideration of the Court. Flagg v. Mann, 2 Sumner, 486, 565.

## 24. PARTITION AT THE HEARING.

### (a.) *Decree for partition and commission to issue.*

The Court doth order, that a commission issue, directed to certain commissioners to be therein named, to divide the estate in question into moieties; and that one moiety thereof be allotted as the share of the plaintiffs, and the other moiety thereof as the share of the defendants; and that the plaintiffs and defendants hold and enjoy their respective moieties in severalty, according to such allotments; and that they execute mutual conveyances to each other of such respective

moieties, according to their respective interests therein, such conveyances to be settled by the said Master [*or, the Court, or, Judge*]. [*If no infants or married women interested, add, in case the parties differ about the same*]; and it is further ordered, that all deeds and writings relating to the said estate, in the custody or power of any of the parties, be produced before the commissioners upon oath, as they shall require; and it is further ordered, that the commissioners be at liberty to examine witnesses upon oath, and take the depositions in writing, and return the same with the commission. Liberty to apply.

## 25. SPECIFIC PERFORMANCE.

### *Reference of Title.*

#### *(a.) Inquiry as to title at the hearing.*

This Court doth order, that it be referred to A. B., one of the Masters in Chancery for the county of, &c., to inquire, whether a good title can be made to the estates comprised in (Lot No. 3 in the particulars of sale, and in) the agreement in the plaintiff's bill mentioned.

\* And in case it shall appear that a good title can be made to \* 2255 the said estates, it is ordered, that the said Master do further inquire when it was first shown that such good title could be made. Adjourn, &c. *Matthews v. Swallow*, 1 Seton Dec. (Eng. ed. 1862) 593.

#### *(b.) Declaration of right on bill by vendor, and inquiry.*

This Court doth declare, that the agreement in the pleadings mentioned ought to be specifically performed and carried into execution, in case (provided that) a good title can be made to the premises comprised therein; and decree the same accordingly. Inquiries as to title. [Form (a), *supra*.]

#### *(c.) Same; where title accepted subject to requisitions, and subject to compensation.*

This Court doth declare, that the defendant is bound to accept the title of the plaintiff to the estate mentioned in the agreement of the — day of — in the plaintiff's bill mentioned, subject to the requisitions of the said defendant upon the said title, mentioned in the exhibit marked B, and dated, &c.; and the Court doth further declare, that the plaintiff is entitled to a specific performance of the said agreement, subject to the deduction of \$ — from the amount of the purchase-money of \$ —, by way of compensation to the defendant in respect of the house-tax in the defendant's affidavit mentioned, provided that the plaintiff can make a good title to the estate comprised in the said agreement, so far as respects the matter of the said requisitions. Inquiry as to title having regard to the requisitions only. 1 Seton Dec. (Eng. ed. 1862) 593, 594.

*Decree for specific performance.**(d.) On bill by vendor to enforce contract for sale.<sup>1</sup>*

The Court doth declare, that the agreement in the plaintiff's bill mentioned, dated, &c., ought to be specifically performed and carried into execution; and decree the same accordingly. And it is ordered, that it be referred to A. B., one of the Masters, &c., to compute interest at the rate \$—— per cent per annum, on the sum of \$——, the (residue of the) purchase-money for the estate comprised in the said agreement, from the —— day of ——, when the same ought to have been paid according to the terms of the said agreement. And the said Master is to take an account of the rents and profits of the said estate received by the plaintiffs or any of them, or by any other person, &c., since the \* 2256 —— day of ——. *If costs are given*, and tax the plaintiffs \* their costs of this suit (cause). And it is ordered that what shall be coming, on the said account of rents and profits, be deducted from the amount (of the residue) of the said purchase-money, and interest (and costs) when so computed (and taxed) as aforesaid. And upon the plaintiffs' executing a proper conveyance of the said estate to the defendant (at the expense of the defendant according to the said agreement), or to whom he shall appoint, such conveyance to be settled by the said Master [*or*, the Court] in case the parties differ, it is ordered that the defendant pay to the plaintiffs the balance which shall be found to remain due to them in respect of such purchase-money, and interest (and costs), after such deduction as aforesaid. Liberty to apply. 1 Seton Dec. (Eng. ed. 1862) 607, 608.

*(e.) Where title accepted at the hearing.<sup>2</sup>*

The defendant R., by his counsel, declaring himself content with the title to the estate, in the pleadings mentioned, agreed to be purchased by him of, &c., this Court doth declare, that the agreement in the plaintiff's bill mentioned, dated, &c., ought to be specifically performed, &c.

*(f.) On bill by purchaser.*

*Declaration and accounts as in Form (d) above.*] And upon the plaintiff paying to the defendant the balance which shall be found due to him in respect of such purchase-money (and) interest (and costs), after such deduction as aforesaid, it is ordered that the defendant execute a proper conveyance of the said estate to the plaintiff, &c.

*(g.) Purchaser having waived title; indemnity against mortgage.*

This Court doth declare, that, under the circumstances in the plaintiffs' bill mentioned, the defendants have waived their right to

<sup>1</sup> Sale of Shares. *Paine v. Hutchinson*,  
L. R. 3 Eq. 257, 260, 261.

<sup>2</sup> Form of decree where no title is found.  
*Turner v. Marriott*, L. R. 3 Eq. 744.



investigate the plaintiffs' title to the estate in the pleadings mentioned, and that they have accepted such title; and thereupon it is ordered, adjudged, and decreed that the defendants specifically perform the agreement dated, &c., by accepting an assignment of the equity of redemption of the said estate from the plaintiffs, without previous investigation of the title; and it is further ordered, &c., that the defendants execute to the plaintiffs a proper deed of indemnity against the mortgage debt secured by the indenture in the bill mentioned, dated, &c., and interest thereon, the plaintiffs, by their counsel, undertaking to execute and deliver to the defendants a proper deed of assignment of the said equity of redemption, and otherwise to specifically perform the said agreement on their own parts, so far as the same has not been \* waived by the defendants; and such deeds of assignment and \* 2257 indemnity respectively are to be settled by the Master [or, Judge, or, the Court]. Defendants to pay plaintiffs' costs of suit. Liberty to apply. 1 Seton Dec. (Eng. ed. 1862) 609.

(h.) *Declaration as to waiver of title.*

Let the order dated, &c., be varied, and instead of the declaration therein contained, that the defendant has accepted the plaintiff's title to the estate, &c., comprised in the agreement, dated, &c., declare that the defendant has waived the right to call for the plaintiff's title to the said estate. *Simpson v. Sadd*, 4 De G. M. & G. 673.<sup>1</sup>

(i.) *Voluntary settlement set aside in favor of purchaser.*

Decree for performance of agreement for sale, with consequent directions. "And it is declared by the Court, that the plaintiff is a purchaser within the intent and meaning of the Act of the 27 Eliz. c. 4, entitled 'An Act against covinous and fraudulent conveyances,' and that the indenture of settlement dated, &c., in the pleadings mentioned, is void as against the plaintiff; and it is ordered, &c., by the Court, that the defendants S. and M. (*trustees of the settlement*) convey or concur with the defendant W. (*vendor and settlor*) in conveying and assuring to the plaintiff, or as he shall direct, such parts of the estate comprised in the said agreement for sale as are comprised in the said indenture of settlement, and also deliver up to the plaintiff all deeds and writings in their custody relating to the said estate." Plaintiff to pay the trustees costs of suit; defendant W. to repay plaintiff what he shall so pay, and pay his costs up to the decree. Liberty to apply. 1 Seton Dec. (Eng. ed. 1862) 610.

*Compensation or abatement.*

(j.) *Inquiry, if part, to which title not shown, material.*

It is ordered, that the Master do inquire whether such part, if any, of the said estate, as to which the plaintiff cannot make a good title, is

<sup>1</sup> For claims respecting occupation rent, and inquiry as to value of timber and acts of husbandry, &c., see 1 Seton (Eng. ed. 1862), 609.

material to the enjoyment of the remainder, and, if not, what deduction ought to be made from the purchase-money in respect thereof.

*(k.) Similar inquiry, without prejudice.*

And in case it shall appear that the plaintiff can make a good title to the said estate, except, &c., containing six acres, &c., in the pleadings, &c., it is ordered and decreed, that the Master do inquire whether \* 2258 \* the said six acres, &c., are material to the possession and enjoyment of the rest of the estate, and what compensation ought to be made to the defendant in respect of the said six acres, &c., in case it shall appear that the same are not material to the possession and enjoyment of the estate; such last-mentioned inquiry to be without prejudice to the question whether such six acres, &c., are material to the possession and enjoyment of the rest of the estate. 1 Seton Dec. (Eng. ed. 1862) 618, 619.

*(l.) Abatement for delay.*

Defendant by his answer admitting the agreement, &c., decree for performance and accounts. "And it is ordered and decreed, that the defendant be at liberty to deduct the sum of \$—, by way of compensation, for delay in delivering possession of the said estate to the defendant."

*(m.) Abatement for deficiency.*

The Court doth declare that the plaintiff is entitled to specific performance, &c. "And to an abatement from the residue of the purchase-money and interest, but to the amount only of what would be the worth (value) of the deficiency of the soil mentioned in the pleadings, covered with wood, after deducting the value of the wood thereon, and decree the same accordingly." And that it be referred to G. F. C., one of the Masters, &c., to settle such abatement, and to compute the interest on the residue of such purchase-money after the rate of, &c., in case the parties differ about the same; and upon the plaintiff's paying unto the defendant what the said Master shall find to be due from him on account of the purchase-money under the said agreement stipulated to be paid, after such abatement as aforesaid, it is ordered that the defendants do convey and assign the premises so contracted to be sold to the plaintiff as he shall direct; such conveyance to be settled by the said Master in case the parties differ about the same. And the Court doth not think fit to give costs on either side. 1 Seton Dec. (Eng. ed. 1862) 619.

*Another form.*

It is declared that the sale and purchase, in the documents and proofs stated and shown, were fair, and that the quantity of land existed, and the title, as declared, existed, and that the description given of the premises was substantially true; and that the fact that the buildings,

stated to be on lot 42, being part and parcel of the premises which were sold entire, and for one entire price, do project in a small degree, on lot 43, being another part and parcel of the said premises, is not sufficient, nor are any of the circumstances stated in \* the case \* 2259 sufficient, to set aside the sale, or to exempt the purchaser from being holden to the performance of the contract of sale. But as the circumstance of that projection may diminish the value of the purchase below what would be its value if such projection did not exist, and may entitle the purchaser to compensation by deduction from the price he gave; it is, thereupon, ordered, that it be referred to G. F. C., Esq., one of the Masters of this Court, to ascertain and report what, in his opinion, under all the circumstances of the case, is the diminution in value (if any) of the premises, as one entire parcel, by means of the projection, below what it would be if no such projection existed, and assuming the value thereof, if the projection did not exist, at \$1,400; and the question of costs is reserved.<sup>1</sup>

*Decree for lease.*

(n.) *On bill by intended lessee.*

The Court declared that the said agreement, &c., ought to be carried into execution, according, &c., and doth order and decree the same accordingly; and that a lease be executed by the defendants S. and M. his wife, to the plaintiff of the estate comprised in the agreement for the life of said M. [*or*, for the term therein mentioned], at the yearly rent of, &c., and that such claims and agreement be inserted in the said lease as are directed by the memorandum of the said agreement [*or*, with the usual covenants]; and if the parties differ, it is hereby referred to G. F. C., Esq., one of the Masters, &c., to settle the same. And it is ordered, that the said plaintiff do execute a counterpart of such lease to the said defendants, and that such lease and counterpart be at the equal expense of the said plaintiff and defendants. And it is ordered that the plaintiff do pay the said defendants their costs of this suit, to be taxed by the said Master. 1 Seton Dec. (Eng. ed. 1862) 620, 621.

(o.) *Decree with inquiry, if leases tendered for execution are proper.*<sup>2</sup>

Decree performance. And it is ordered, that the said Master do inquire whether the lease of the messuage, &c., in question, executed by the plaintiff and tendered by him to the defendant, is a proper lease; and if it shall be found that the same is a proper lease, it is

<sup>1</sup> Bailey v. Piper, L. R. 18 Eq. 683; Castle v. Wilkinson, L. R. 5 Ch. 534; Barnes v. Wood, L. R. 8 Eq. 424. See King v. Bardeau, 6 John. Ch. 38; Woodbury v. Luddy, 14 Allen, 1.

If one who has agreed to convey land with covenants of warranty and release of dower, is unable to procure the release of dower, a conveyance without such release and without cove-

nants relating to dower may be decreed, with compensation in damages. Davis v. Parker, 14 Allen, 94; Woodbury v. Luddy, *supra*.

For outlines of a decree in such a case, see Davis v. Parker, 14 Allen, 98, 99.

<sup>2</sup> See *form* of decree respecting the acceptance of a lease, and the kind of lease a party is bound to accept, in Rutgers v. Hunter, 6 John. Ch. 220, 221.

\* 2260 \* ordered that the defendant accept the same, and execute to the plaintiff a counterpart thereof; but, if not, that a proper lease be settled by the said Master [*or*, by the Judge, *or*, by the Court].

(*p.*) *Lease antedated, to enable action on covenant; defendant to admit execution or date.*

“And the plaintiff by his counsel consenting, that the lease directed by the said decree, dated, &c., to be executed by the defendant to the plaintiff, shall bear date the — day of —, and undertaking to admit in any action which may be brought under such lease for the recovery of the possession of the premises (estate), to be demised by such lease, or upon any breach or breaches of any covenant or covenants to be contained in such lease, that the said lease was executed on the day it shall bear date, it is ordered that the said decree dated on the — day of —, 1857 (for specific performance), be affirmed, &c.” 1 Seton Dec. (Eng. ed. 1862) 622.

(*q.*) *Direction for lease to contain particular covenant.*

And it is ordered, that such lease shall contain a covenant, on the part of the plaintiff, to pay the taxes, payable in respect of said farm. 1 Seton Dec. 622.

(*r.*) *Specific performance of an agreement for a family compromise.*

E. L. B. v. J. L. P.

This cause came on to be heard and was argued by counsel, and the Court having considered the same, do find and declare that a concluded agreement was made between the plaintiffs on the one part and the defendant on the other part, as is stated in the said bill, the terms whereof appear in and by the letter of the defendant of the twenty-fourth day of April, A. D. 1860, which is set out in the said bill, and that the plaintiffs are entitled to specific performance thereof, and that by force of the said agreement the defendant became charged with the trust of executing the said agreement; <sup>1</sup> and that the defendant being about to leave the United States, without an intention to return, and having actually departed into foreign parts soon after the filing of the bill, and the plaintiffs being remediless by reason thereof save by the said bill, the Court doth retain the same for the purpose of giving the relief to which the plaintiffs are justly entitled. And it is ordered, that the plaintiffs have leave to apply to the Court for such further directions as may be needful to compel the specific performance of the said trust. Baylies v. Payson, 5 Allen, 473.

\* 2261 \* (*s.*) *Specific performance and reference of title.*

Declare, that the contract of sale between the parties was lawfully executed, and binding upon the defendant by the insertion of his name

<sup>1</sup> The Court refused to entertain the bill merely to declare the trust, but the defendant declared and the bill retained for further direction. Baylies v. Payson, 5 Allen, 473.  
being about to leave the country, the trust was

in the memorandum, which the auctioneers, as his agents for that purpose, did, in writing, immediately after taking down his bid; and I shall further declare, that the defendant did not, and could not, without the consent and agreement of the plaintiffs (and no such consent and agreement appears), withdraw himself from the obligation of the contract by presenting T. as his substitute, when he did not disclose, either to the plaintiffs or to the auctioneers, at the time of entering into the contract, that he acted as agent for T. And I shall direct the usual reference to a Master, to examine whether a good title can be given by the plaintiffs, for the house and lot sold to the defendant; and that he give to the defendant's solicitor due notice of the examination, and that the evidence taken in chief, in this case on the point of title, be submitted to the Master, together with such other competent proof as the parties, or either of them, may think proper to furnish; and that he report an abstract of such title, together with his opinion thereon, with all convenient speed. *M'Comb v. Wright*, 4 John. Ch. 670.

(t.) *For specific performance on breach of a bond to reconvey land on certain conditions, after verdict finding a neglect to perform.*

N—, ss.

S. J. C.

October term, 1857.

O. R. v. C. K. R.

And now, verdict having been returned at the last — term, that the defendant C. K. R. did neglect to perform the condition of the bond or agreement bearing date June 15, 1854, and recorded, and set out in the declaration, as the conditions are specified in the said bond, after argument by the counsel for the plaintiff and for the defendant, and due consideration thereon by the Court; —

It is [declared by the Court] that the covenant of the said C. K. R. in the said bond or agreement to discharge all his right, title, and interest in and to the farm and tracts of land conveyed by the plaintiff to the defendant by said deed dated June 15, 1854, and to give back a good and sufficient deed of said farm, and lots, and buildings, to the plaintiff, if he, the said C. K. R., should neglect to perform the condition of the bond, ought to be specifically performed and carried into execution, and that the said O. R. is entitled to a specific performance of the said covenant from the defendant, the said C. K. R. [And the same is ordered and decreed accordingly.]

It is further ordered, adjudged, and decreed, that the defendant, the said C. K. R., do, within fifteen days from the entry of this judgment, \* make, execute, acknowledge, and deliver to the plaintiff \* 2262 a deed of release and quitclaim in common form of all the lands and real estate described in the said deed of the plaintiff to the defendant dated June 15, 1854, with covenants of warranty against all persons claiming by, through, or under the defendant, the said C. K. R., and that he, the said C. K. R., do deliver up the possession of said lands to the plaintiff, so that the plaintiff may be thereby revested and repossessed of and in the said lands as of his former

estate, and that in case of the neglect of the said C. K. R. within the said fifteen days, to make, execute, acknowledge, and deliver to the plaintiff such deed of release and quitclaim with covenants as aforesaid, or to deliver up the possession of said lands to the plaintiff as aforesaid, and upon affidavit of the plaintiff or his counsel filed with the clerk, that the said C. K. R. has neglected to make, execute, acknowledge, and deliver to the plaintiff such deed of release and quitclaim as aforesaid, or that he has neglected to deliver up the possession of said lands to the plaintiff as aforesaid, that then at any time after the expiration of said fifteen days, and within one year from the entry of this judgment, the clerk of this Court do make an issue, and he hereby is required to issue a writ of *habere facias possessionem*, with a copy of this decree thereto annexed, to the plaintiff, against this defendant, for the said lands described in the said deed, and set out in the pleadings, in order that upon the plaintiff's being restored to the possession of the said lands under and by virtue of the said writ of *hab. fac. poss.*, and due return and registration of said writ and return in the Record of Deeds, the plaintiff may be revested of and in said lands as of his former estate, and as he was seised and possessed thereof before the execution of said deed by him to the plaintiff on the fifteenth day of June in the year 1854.

And it is further ordered and decreed, that the plaintiff have and recover his costs of this suit to be taxed, and that the clerk do issue the execution therefor to the plaintiff in common form as usual when one party recovers costs against another in this Court. *Robinson v. Robinson*, 9 Gray, 447.

By the Court,  
E. S., Clerk.

(u.) *Interlocutory Decree.*

*Specific performance; family compromise; real estate and stocks.*

F. L. and M. F. L., his wife, v. O. M. F.

And now upon consideration of the pleadings, issue, and verdict of the jury in the case, and after argument of counsel for the plaintiffs and defendant; —

\* 2263     \* The Court doth declare, that the articles of agreement made and concluded on the third day of July, in the year 1855, between the parties, of which a copy is annexed to the bill and made a part of the pleadings and marked (B), ought to be specifically performed and carried into execution as of the third day of July, 1855; and that the plaintiffs are entitled to have the said O. M. F. release and quitclaim to the said M. F. L., to her separate use, all the outlands and all the rest and residue of the real estate formerly belonging to the testator, to wit, &c., which lots are set out in the inventory and made a part of the pleadings; and doth decree the same accordingly.

And whereas it has not been proved or alleged that the railroad shares claimed by the plaintiffs were needed to be sold for the payment of the debts of the testator, it is further declared by the Court that the plain-

tiffs are entitled to have the defendant convey to the said M. F. L., to her separate use, two of the shares in the Old Colony and Fall River Railroad Corporation, the six shares in the Boston and Worcester Railroad Corporation, and the two shares in the Concord Railroad Corporation, all which shares were valued in the inventory made a part of the pleadings at \$794, upon the condition that the plaintiffs, the said F. L. and M. F. L. his wife, do, by deed, release to the defendant, for and during the term of her natural life, the improvement of the homestead farm of the said Isaac Fobes, deceased, with all the buildings thereon, with the privilege of cutting wood thereon for fires, and for fences and the repairs of buildings, the income of three-thirtieths of the parsonage, the use and income of the pew in the Scotland meeting house, and the use and income of the river meadow lot, and upon the further condition that the plaintiffs do, and shall, release absolutely to the defendant, for her own use and disposal, all the personal property on the said farm, also all the notes, claims, and demands due to the said estate of the testator, also the five shares of stock in the Bristol County Bank, and four of the six shares of stock in the Old Colony and Fall River Railroad Corporation owned by the said Isaac Fobes, deceased, and all other the personal estate whatsoever described in said inventory.

And it is further ordered, that unless the parties agree in regard to the matter, and execute conveyances accordingly within sixty days from the twenty-seventh day of January, 1859, and within such time the defendant pays to the plaintiffs the dividends paid upon said ten shares of railroad stock since the filing of this bill, to wit, since the eleventh day of August, in the year 1856, that then it be referred to Wm. H. W., Esq., as a special Master in Chancery, to take and state an account of the dividends declared and paid since the filing of the bill, and to prepare the conveyance to be executed by the parties in conformity with this decree, and to summon the said parties before him and cause said conveyance to be duly executed by them; the agreement of the parties \* under this decree, and a copy of the deeds \* 2264 in pursuance thereof to be returned into Court; — or if the case goes to the Master, his report of his doings under this decree to be submitted to this Court for approval and confirmation. *Leach v. Fobes*, 11 Gray, 506.

By the Court,  
Wm. H. W., *Clerk*.

*(Final decree.)*

F. L. and M. F. L., his wife, *v.* O. M. F.

And now the agreement of the parties under the interlocutory decree and an office copy of the deed of the defendant, to the said M. F. L., of the real estate, pursuant to said decree, and a copy of the receipt by the said M. F. L. to the defendant having been returned into Court, by which receipt it is shown that the defendant has transferred to the said M. F. L., to her separate use, the ten shares of railroad stock mentioned in said

interlocutory decree and paid to said M. F. L., the dividends on said ten shares as reported by the Master, \$141, and \$28 more accruing between the date of said report and the time of payment in manner and form as required by said interlocutory decree. — It is now ordered, that said conveyance of real estate and said transfer of said ten shares of stocks, and said payment of dividends, in all, \$169, be, and the same hereby are, approved and confirmed.

And it is further ordered, adjudged, and decreed, that the plaintiffs have and recover hereby judgment for their costs to be taxed before the clerk in the usual form and manner, and that the clerk do issue an execution therefor to the plaintiffs. *Leach v. Fobes*, 11 Gray, 506.

By the Court,

Wm. H. W., *Clerk*.

(*v.*) *Specific performance of agreement for policy of insurance.*

U. S. C. C.                    }  
Mass. District, }

October term, 1858.

Union M. Ins. Co. *v.* C. M. M. Ins. Co.

This case was thence continued from term to term until this present term, when, to wit, on the fourteenth day of November, A. D. 1855, the same came on to be heard on the bill and answer and proofs in the case, and was argued by counsel.

And it appearing to the Court that the plaintiffs, through their agent, made a proposal in writing for insurance which contained all the necessary terms of a valid contract for a policy, and that the defendants accepted this proposal.

\* 2265      \* That this acceptance made a legal contract between the parties, which it is the duty of the Court to order to be specifically performed.

That, as it is admitted that the plaintiffs would have a good cause of action at Law upon a policy, if issued in pursuance of the contract, there should be decreed to them in this suit what they would be entitled to recover if a policy were issued and that which was agreed to be done were actually done;

Thereupon it is ordered, adjudged, and decreed, that the said agreement so entered into between the said plaintiffs and the said defendants set forth in the bill of complaint, and proven in this cause, be specifically performed.

It is further ordered, adjudged, and decreed, that the plaintiffs recover of the said defendants the sum of eight thousand seven hundred and two dollars and forty-three cents, as and for their damage in this behalf sustained, a deduction having been first made from the sum agreed to be issued for premium and salvage, and also the sum of two hundred and four dollars twenty-four cents, for their cost in this behalf sustained. *U. M. I. Co. v. C. M. M. Ins. Co.*, 2 Curtis C. C. 521.



(w.) *Decree for specific performance in case of sale of good-will of a business with inquiry as to subsequent dealings with the stock in trade.*

His Honor doth order, that the agreement in the bill<sup>1</sup> mentioned ought to be specifically performed and carried into execution, in case a good title can be made to the premises comprised therein. And it is ordered that the following inquiries be made:—

1. An inquiry whether a good title can be made to the leasehold premises comprised in the indenture of lease dated, &c., in the agreement in the plaintiff's bill mentioned; and, in case it shall appear that a good title can be made to the premises, when it was first shown that a good title could be made.

2. An inquiry what was the value on, &c. [*the date of the contract*],<sup>2</sup> of the stock of drugs, chemicals, and other medicines, implements, utensils in trade, articles, house and trade fixtures comprised in the said agreement.

3. An inquiry whether any and what part thereof and to what amount has been sold or removed from the premises, and under what circumstances. And it is ordered, that the further consideration of this

\* cause be adjourned, and any of the parties are to be at liberty \* 2266 to apply to this Court as they may be advised.

(x.) *Against specific performance; causes stated.*

"It is declared, that from the great inadequacy in value of the lots in the village of N., which the plaintiff contracted to convey to T. E., deceased, for the two farms in the county of O., which the said T. E. contracted to convey to the plaintiff, and also from the habits of intoxication in which the said T. E. had indulged, in the last years of his life, and the mental debility produced thereby, and also from the want of readiness and ability in the plaintiff to convey a good and unincumbered title to the said lots, at the time fixed for the performance of the said contract, or at any time thereafter during the life of the said T. E., the articles of agreement mentioned in the pleadings ought not, in equity and good conscience, to be decreed to be carried into specific execution by the defendants. It is, thereupon, ordered, &c., that the bill be dismissed without costs." *Seymour v. Delancy*, reported in 6 John. Ch. 222.<sup>1</sup>

<sup>1</sup> *Bellingham v. Norrish*, 16th November, 1855, M. R. A decree containing a reference as to title should contain a declaration that the contract ought to be specifically performed. *Mole v. Smith*, Jac. 490-495.

<sup>2</sup> In *Baxter v. Connolly*, 1 J. & W. 580, Lord Eldon observed that the Court would not execute a contract for the sale of a good-will, but this observation does not apply to the case

of a purchase of the good-will of a business, together with the vendor's term or interest in the house where the business is carried on. See *Coslake v. Till*, 1 Russ. 376; *Dakin v. Cope*, 2 Russ. 170; *Bryson v. Whitehead*, 1 Sim. & Stu. 74.

<sup>1</sup> For form of decree where no title is found: lien on estate for deposit and costs. See *Turner v. Marriott*, L. R. 3 Eq. 744, 745.

## SPECIFIC RELIEF.

## 1. LOST INSTRUMENTS. FURTHER ORDER.

*(a.) In case of lost mortgage deeds.*

DIRECTION to tax defendant's costs of suit, and raise and pay them out of fund in Court. And the Court doth order that "the plaintiff S., at her own expense, execute to the defendant R. her bond to indemnify the said defendant against any demand which may be made upon him, in respect of the mortgage deeds in the pleadings mentioned; such bond to be settled, &c., in case the parties differ. And the Court doth further order, that, upon the due execution of such bond, such execution to be certified, &c., the residue of the said, &c., be transferred to the plaintiff S.; and thereupon that the plaintiff reconvey and reassign the mortgaged premises to the defendant R., or as he shall direct, free and clear, &c., such reconveyance, &c., to be at the expense of the defendant R." Liberty to apply.

*(b.) Like decree; with injunction.*

After declaring plaintiff entitled to redeem, and making injunction to stay ejectment perpetual; and the plaintiff having paid the principal money, the defendant to reconvey and deliver all deeds, &c., and the defendant to repay interest paid to him without prejudice by the plaintiff, after six months' notice of paying off the mortgage. "And the Court doth order, that the defendants, at their expense, give to the plaintiff a good and effectual indemnity or security in respect of the loss of the several deeds, dated, &c., in, &c., mentioned, to indemnify the plaintiff, his heirs and assigns, and his and their estate and effects, and the mortgaged premises in the pleadings mentioned, from and against all loss, costs, charges, damages, and expenses, and other consequences, which the plaintiff, his heirs or assigns, or the said premises shall or may incur, sustain, or become liable to, for or by reason of, or on account or in respect of, the said loss of the said deeds in any manner howsoever; and that such indemnity or security be settled, &c." Defendant to pay plaintiff's costs of suit and at law. 1 Seton Dec. (Eng. ed. 1862) 630.

The Court doth declare, that the defendant is bound to indemnify the plaintiff's (bankrupt's assignees) and the separate estate of the said

bankrupt against all liability and loss in respect of the bill of exchange for \$—— in the pleadings mentioned; and decree the same accordingly; and doth order that the defendant G. on or before, &c., or within one week after service hereof, take up such bill and pay what is due in respect thereof; defendant to pay plaintiff's costs of suit to be taxed. Liberty to apply.

## 2. FRAUDULENT DEALINGS.

### (a.) *Release set aside for fraud, and not pleadable at law.*

This Court doth declare, that the release dated, &c., obtained by the defendant C. from the plaintiff M., was a fraud on her, and ought to be delivered up to be cancelled. And doth order and decree, that the defendant C. (within, &c.) deliver up the said release to the plaintiff M.; and, in the mean time, that the said defendant be restrained from pleading or setting up the said release in bar to the action brought by the plaintiffs P. and M., in the names of the plaintiffs M. and S., upon the bond executed to them by the said defendant for the benefit of the plaintiff P.; defendant C. to pay plaintiffs' costs of suit, except so much of such costs as relate to the deposition of, &c. Liberty to apply.

### (b.) *Purchase completed through fraud and misrepresentation set aside.*

"This Court doth declare, that the plaintiff B. was induced to complete his purchase of the estates, &c., in the pleadings mentioned, by the fraudulent misrepresentations of the defendants A. and W.; and the Court doth further declare, that the several agreements entered into by the plaintiff for the purchase of the said estates, &c., and carried into effect and completed by him, ought to be rescinded; and the Court doth order and decree that the same be delivered up to be cancelled." And that it be referred to, &c., to take the following accounts, that is to say: 1. An account of interest on the purchase-money paid by the plaintiff to the defendant A., at the rate of, &c., from the time of payment; 2. An account of money paid by the plaintiff in respect of auction duty on the sale; 3. An account of the costs, charges, and expenses paid and incurred by the plaintiff in consequence of, and incident to the purchase; 4. An account of rents and profits received by the plaintiff; and the Court doth further order and decree, that what shall appear to be due on such account of rents and profits be deducted from the said sum of \$——, and what shall appear to be \* due in re- \* 2269 spect of the interest thereof, and the said auction duty and costs, charges, and expenses; and that the balance which shall be found to be due to the plaintiff be (within, &c.) paid to him by the defendant A.; and that upon such payment the plaintiff reconvey to the defendant A. the said estates, &c.; and that the deeds of covenant executed by the plaintiff, as in the said bill mentioned, be delivered up to be cancelled. Defendants to pay plaintiff's costs of suit. Liberty to apply. *Berry v. Armistead*, 2 Kee. 229; 1 Seton Dec. (Eng. ed. 1862) 645.

(c.) *Transfer of scrip shares set aside for fraud.*

This Court doth declare, that the transfer by the defendant to the plaintiff of the 1000 scrip shares, formerly the property of the defendant in the P. Ry., in the bill mentioned, was paid in equity as between the plaintiff and the defendant; and that, notwithstanding such transfer, the defendant continued to be in Equity the owner of the said scrip shares, and that he is liable to repay to the plaintiff the sum of \$2100 with interest thereon, and to indemnify the plaintiff against all sales in respect of the said scrip shares, and in respect of any scrip shares in the said P. Ry., which have been substituted for, or registered in respect of, the said scrip shares, and to accept a transfer of such shares from the plaintiff. And the Court doth order and decree that the defendant M., within one month after service of this order, repay to the plaintiff B. the said sum of \$2100, together with the sum of \$208, for interest thereon, at the rate of, &c., from the twenty-first day of August, 1853, to this time, and also subsequent interest on the said principal sum to the day of payment; and the plaintiff, by his counsel, admitting that he has paid no calls in respect of the aforesaid 1000 scrip shares, in the plaintiff's bill mentioned, it is ordered that it be referred to, &c., to inquire and report what calls have been made on account of the said scrip shares, or on account of any shares in the P. Ry., which have been substituted for, or registered in respect of, such shares, and what is due in respect of such calls; and it is further ordered, that the plaintiff make to the defendant, and the defendant accept from the plaintiff a transfer of the shares in the P. Ry., which have been substituted for, or registered in respect of, the said 1000 scrip shares; and that the defendant do and concur in all acts necessary for that purpose, including the payment by the defendant of all sums which shall appear by the Master's report to be due in respect of such calls as aforesaid, and also such further sums, if any, as shall, before such transfer, become due on account of further calls in respect of the said 1000 scrip shares, or in respect of any shares which have been substituted for, or registered in respect of, such shares. Defendant to pay plaintiff's costs of suit. Liberty to apply. 1 Seton Dec. (Eng. ed. 1862) 645, 646.

\* 2270 \* (d.) *Plaintiff declared not bound by mortgage and judgment obtained from him by fraud by his solicitor, who received and misapplied the money.*

This Court doth declare, that the plaintiff is not bound by the deeds of mortgage and further charge in the bill mentioned, and thereupon doth order and decree, that the same be delivered up to be cancelled; and that satisfaction be entered upon the judgment, in the bill mentioned, obtained by the defendants C. and R. (*mortgagees, innocent parties*) against the plaintiff; defendants to pay plaintiff's costs of suit. *Wall v. Cockerell*, 1 Seton Dec. (Eng. ed. 1862) 648.

(e.) *Settlement by lunatic, since so found, set aside.*

And it appearing by the evidence aforesaid, that the indenture of settlement, dated, &c., made or expressed to be made between F. of the one part and the defendants M. and S. of the other part, was executed by the said F., since deceased, when of unsound mind, the Court doth declare, that the said indenture of settlement of the — day of —, is null and void; and it is thereupon ordered and decreed, that the defendants M. and S. deliver up the said indenture of settlement to the plaintiff to be cancelled. Directions to tax, raise, and pay costs of all parties out of fund in Court (*being the settled fund*), and for transfer of the residue to the legal representatives of the lunatic. 1 Seton Dec. (Eng. ed. 1862) 648.

(f.) *Conveyance in contemplation of insolvency set aside as fraudulent.*

“This Court doth declare, that the indenture dated, &c., in the pleadings mentioned, is fraudulent and void as against the creditors of the insolvent debtor in the pleadings named; and doth order that the defendant deliver up the said indenture to the plaintiffs to be cancelled; and the Court doth order and decree, that it be referred to, &c., to take an account of the rents and profits of the estate comprised in the said indenture received by the defendant or by any other person, &c.; and that the said defendant, within one month after the date of the Master’s report of the result of such account, pay the balance, if any, that shall be found to be due from him to the plaintiffs C. and W., as assignees of the estate of the said insolvent debtor.”—Defendant to pay plaintiffs’ costs of suit. — “But, in case, on taking the said account, any balance shall appear to be due to the said defendant, it is ordered that the further consideration of this cause and of the subsequent costs, be adjourned,” &c. *Cazenove v. Pilkington*, 1 Seton Dec. (Eng. ed. 1862) 649.

\* (g.) *Decree declaring a party estopped from asserting a legal title after acquiescence in the purchase of the premises by a bona fide purchaser from a third party.* \* 2271

“It is declared and adjudged, that the defendant encouraged and advised the sale, by E. F., and the purchase, by the plaintiff, L. S., of the six and a half acres of land, in the village of B., devised by the will of R. F. to the said E. F., and in the pleadings and proof mentioned; and recognized and admitted the title derived under the said will, and for the space of nearly or about — years subsequent to the death of the said R. F., and with the knowledge of her will, the defendant acquiesced in the acts of ownership of the said E. F., as devisee under the said will, and of the said L. S., as purchaser under the said E. F. And it is further declared and adjudged, that the defendant is in Equity *concluded and estopped*, by those acts and admissions, from asserting his legal title, as heir of the said R. F., to the said six and a half acres of

land, against the claim or title thereto, on the part of the plaintiffs, derived under the will of the said R. F., and that the declaration by the defendant of his ignorance, during all that time, of the invalidity in Law of the will of the said R. F., if well founded in point of fact, is no sufficient defence against the equitable bar to his legal title, arising from the acts and admissions aforesaid; inasmuch as, with knowledge of all the facts, he was bound to inform himself of his own title, before he undertook to advise and encourage the sale and purchase of the same land by others, under an adverse title. It is, thereupon, ordered, adjudged, and decreed, that the defendant, and all persons claiming under him, be perpetually enjoined from prosecuting at Law, by action of ejectment, or otherwise, his right, claim, or title, as heir to his daughter R. F., to the six and a half acres of land aforesaid, as against the plaintiffs or either of them, or as against any other person or persons, claiming or possessing the same, by, from, or under them or either of them, or under any right or title derived from them or either of them; and the injunction heretofore issued in this cause is hereby declared to be perpetual. And it is further ordered, that a copy of this decree be served on the defendant, and on his solicitors, attorneys, and counsel, to the end that due obedience may be rendered thereto. And it is further ordered, adjudged, and decreed, that no costs of this suit be charged by either party as against the other.”<sup>1</sup> Decree entered in *Storrs v. Barker*, reported 6 John. Ch. 166.

\* 2272 \* (h.) *On a bill to rescind a contract for the purchase and sale of timber lands, on account of material misrepresentation; to obtain repayment of the money advanced, and to have the notes given for the balance discharged and cancelled, or compensation made and the plaintiff indemnified.*

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is declared by the Court, that the contract of sale, and the conveyance of the premises, and the notes of the said Daniel thereupon, as set forth in the bill, were made by and between the said Otis Daniel and the said James Todd and other parties, upon material misrepresentations and mutual mistakes as to the quantity of timber on the premises so sold, and therefore ought to be set aside, and held null and void; and the said Otis Daniel ought to be repaid the amount of the said purchase-money, actually paid by him thereupon and therefor, by the said Todd, who received the notes for the same, and in his aid and for his relief, by such of the other parties, defendants to the bill respectively, for whom the said Todd acted as agent, or who with a full knowledge of, and assent to, the said contract of sale and misrepresentations and mistakes, have received any of the said notes, or any part of the purchase-money paid thereon by the said Daniel; but not for the part thereof received by any other party. And

<sup>1</sup> The form of a decree based upon the same principle, with variations as to the particulars of the order, and a reference to Master to take

an account of rents, profits, taxes, repairs, permanent improvements, &c., will be found in *Wendell v. Van Rensselaer*, 1 John. Ch. 344.

thereupon, in furtherance of the declarations aforesaid, it is further ordered, adjudged, and decreed, that the same contract of sale, and conveyance, and notes, be, and hereby are, annulled, rescinded, and declared utterly void, and of no effect.

And the said Otis Daniel is further ordered, adjudged, and decreed, to reconvey the premises by such due and reasonable conveyance or conveyances as shall be devised and reported by a Master, when and so soon as the purchase-money actually paid by him shall be repaid as hereinafter mentioned.

And it is further ordered, adjudged, and decreed, by the Court, that the said James Todd be, and hereby is, held directly liable to the plaintiff for the whole amount of moneys paid as aforesaid, deducting, however, therefrom the proceeds of timber sold, as well as the value of timber taken from the said lands, by and under authority of the said Otis Daniel, and remaining unsold, and making all due allowances for all proper charges and expenses incurred in regard to said timber, and for taxes paid on the said lands.

And it is further ordered, adjudged, and decreed, that such of the other parties, defendants to said bill, as with a full knowledge of the premises, or for whom the said Todd acted as agent, or who assented to the said contract of sale and conveyance, with a full knowledge of the premises, shall be, and hereby are, decreed to be liable in aid and relief of the said Todd, to pay and deliver back to the said Otis Daniel \* such parts or portions of the purchase-money paid by \* 2273 the said Daniel for the said lands, as have been received by them respectively in the premises, or on the notes of the said Daniel so received by them; but no one of them to be liable for any purchase-money or notes received by any of the other parties, defendants.

And it is further ordered, adjudged, and decreed, by the Court, that no damage or interest on the aforesaid moneys be allowed, except the proceeds of such timber, sold and unsold, as aforesaid, shall furnish a fund therefor; and in that event, interest upon said purchase money to be added thereto, as an offset *pro tanto* to the excess of said proceeds not exceeding the amount of such excess.

And it is further ordered, adjudged, and decreed by the Court, that it be referred to S. L., Esquire, as Master, to ascertain the amount due to the plaintiff on the basis of this decree, and also the particular notes and sums received by each of said defendants of said purchase-money, so paid and secured as aforesaid, and to report the same to the Court.

And it is further ordered, adjudged, and decreed by the Court, that the Master be clothed with full power to examine, as well the parties, as any other witnesses, orally or upon written interrogatories, under oath, in the premises, and to require the production of all vouchers, papers, and other documents pertinent and proper in the premises; and that he state a full account in the premises, upon the basis of this decree. And that he be clothed with all the usual powers and authorities of a Master, in all things touching the premises.

And all further orders and decrees are reserved for the consideration of the Court. Daniel v. Mitchell, 1 Story, C. C. 196-198.

(i.) *Decree declaring a levy void, enjoining not to set up any title under it, and ordering a release.*<sup>1</sup>

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed by the Court, that the said levy on the land in the said Charlestown, in the pleadings mentioned, being made with full notice of the title of the plaintiff in the bill mentioned, the title thereto is a fraud upon the plaintiff, and therefore is to be held utterly void; and the Court do declare the same accordingly. And it is further ordered, adjudged, and decreed by the Court, that the said defendant, his heirs and assigns, be perpetually enjoined not to set up or assert any title thereto against the said plaintiff, his heirs and assigns, under the said levy; and that the said defendant do execute, in due form of law, within thirty days from the entering of this decree, a  
 \* 2274 deed of release of all his right and title under the said levy to the said plaintiff, his heirs and assigns, in such form as shall be settled by T. P. Esquire, one of the Masters in Chancery of this Court, and that the plaintiff recover costs. *Briggs v. French*, 2 Sumner, 261.

(j.) *Decree declaring void the levy of an execution in favor of a judgment creditor of an insolvent debtor upon the debtor's reversion of real estate, after the first publication of notice of issuing the warrant.*

This cause came on to be heard upon the pleadings and the proofs, as reported by the Judge who heard the cause sitting in Equity in Boston on the twenty-third day of August in the year 1862, and was argued by counsel; and after due consideration the Court doth declare the levy of the defendant's execution upon a portion of the reversionary interest in said lands, formerly belonging to said L. S., to be null and void, as against the plaintiff, as such assignee of said L. S., an insolvent debtor; and that the plaintiff, as such assignee, holds in fee the entire one undivided half of said farm and lands described in said deed of J. S., the father, to said L. S. and J. S., Jr., bearing date the fourth day of December, in the year 1848, subject to the life-estate of said J. S. therein, upon the trust to sell the same for distribution among the creditors of said L. S., and it is ordered, adjudged, and decreed that the said W. W., upon the tender to him of a release to the plaintiff of said lands so levied on, do, and he hereby is required to execute, acknowledge, and deliver the same to the plaintiff, under the penalty, in case of a refusal so to do, of what may befall thereon; and that the plaintiff have execution, in common form, forthwith, against said Whiston, for his costs of this suit to be taxed by the clerk. *Hall v. Whiston*, 5 Allen, 126.

E. R. H., *J. S. J. C.*

Attest Wm. H. W., *Clerk*.

<sup>1</sup> The form of decree in case where execution had been fraudulently issued and sale made under it;—declaring title under sale

void and directing accounts, see *Troup v. Wood*, 4 John. Ch. 260, 261.



(k.) *Setting aside a fraudulent conveyance charging the real estate with a judgment debt, although not directly liable to an execution, and not permitting the conveyance to stand as security for advances made on account of it to the grantor, with the meditated intent to defraud.*<sup>1</sup>

This cause came on to be heard at this term, and was argued by counsel, and thereupon upon consideration thereof,

It was ordered, adjudged, and decreed as follows, to wit, that the conveyance made by the said S. S. mentioned in the bill and answers in this cause, bearing date the fifteenth day of September, A. D. 1809, to the said Esther Steene and Elizabeth Foster, and William Steene and \*the said William Foster, for two certain farms lying in G. & F. \* 2275 in the county of P., within said district of R. I., containing three hundred and thirty-five acres of land, one called the Wells farm and the other called the Rounds farm, and also the conveyances in the said bill and answers mentioned, made by the said S. S. to the said Z. S., bearing date the fifteenth day of September, A. D. 1809, for a farm or lot of land, situate in Smithfield, in said district, and known by the name of the Waterman lot, containing fifty-four acres, and also the conveyances in the said bill and answers mentioned, made by the said S. S. to D. S. and to D. S. and the said A. S., bearing date the fifteenth and eighteenth days of September, A. D. 1809, for the farm on which the said D. S. then lived, situate in G. aforesaid, called the D. E. farm, lying on both sides of the turnpike road; and also the deed in the said bill and answers mentioned, made by the said S. S. to the said Z. S. bearing date the eighteenth day of September, A. D. 1809, for a lot of land situate in said G., containing twenty-six acres; and also the deed, in the said bill and answer mentioned, made by the said S. S. to the said Z. S. and S. S., Jr., bearing date the twenty-second day of November, A. D. 1809, for the farm, whereon the said S. S. then lived, situate in the said G., it being all the land he purchased of John Eddy, &c., and is about three hundred acres, were made by the said S. S. with the intent to defraud his creditors, and particularly the plaintiff, and are, therefore, as to the plaintiff, utterly void.

But inasmuch as it appears to the Court, that the real estate so as aforesaid conveyed to the said D. S., and to the said D. S. and A. S. have, with the exception of a life-estate therein still held by the said A. S., been conveyed to persons who are not parties to the present bill, and the plaintiff seeks no relief against them, it is further ordered, adjudged, and decreed, that the said life-estate of said A. S. only be subject to the debt of the plaintiff in this suit, in manner as herein-after stated, without prejudice to the rights of persons not parties to this bill.

And it is further ordered, adjudged, and decreed, that the said conveyances before mentioned, having originated in a meditated fraud upon the creditors of the said S. S., cannot be permitted to stand as a security

<sup>1</sup> See *Pratt v. Pond*, 5 Allen, 59. A judgment creditor's bill, filed to reach property or interests unknown to the plaintiff, and perhaps

concealed, need not indicate the property sought to be reached. *Dutton v. Thomas*, 97 Mich. 93.

for any debts then due to the grantees, or for any subsequent advances by them made in furtherance of the original intention of the parties thereto.

And it is further declared and decreed, that the plaintiff has a right to be paid the principal debt due to him, with interest up to the time of this decree, and that the same ought to be, and is decreed to be, a charge on the same lands, and on the rents and profits (making all proper allowances), which have accrued to the respective respondents,

or might have accrued to them without wilful default, since the \* 2276 estates \* contained in the same conveyances have come to their hands, possession, and use; and it is declared and decreed, that the said lands, rents, and profits are specifically holden for, and charged with, the payment of the plaintiff's said debt.

And it is further declared and decreed, that the defendants be permitted to pay in the proportion of the value of the estates respectively conveyed to them, to be ascertained by a Master, the amount due to the plaintiff for principal and interest with costs, if they shall elect so to do, within sixty days from the date of this decree, and in that event the plaintiff is to assign to them, by conveyances to be approved by a Master, all his right and title to the judgments stated in his bill, and to the debts due, and his right and title under this decree; and the defendants shall be admitted to hold the same accordingly as a charge on the same lands; but if the defendants shall not pay the said debt and costs within the period aforesaid, then the same Master is to ascertain the rents and profits of the said estates as aforesaid, which are to be paid by the defendants respectively towards the discharge of the plaintiff's debt, and if this fund shall not be sufficient, or shall not be productive, then it is further declared and decreed, that the Master shall sell the lands so conveyed to the defendants by the conveyances aforesaid, or a sufficiency thereof to pay the plaintiff's debt, interest, and cost, at public auction to the highest bidder, in manner as shall hereafter be decreed by the Court, and make due and legal conveyances thereof to the purchaser or purchasers thereof, and the defendants S. S., Z. S., A S., S. S., Jr., E. S., W. F., and E. F. shall respectively join in such conveyance or conveyances, releasing their right, title, and interest therein and thereto, and covenanting against their own acts, in such manner as the Master shall approve, and the proceeds of such sale shall be brought into this Court to discharge the plaintiff's debt and costs of suit.

And it is further declared and decreed, that it be further referred to the same Master, to ascertain by an examination of the plaintiff on oath or otherwise, what was the value at which the plaintiff received the Farmers' Exchange bills for which the drafts, on which his judgments were founded, were given, at the time when he received or bought the same, and that the plaintiff is to be allowed that sum, the damages on said drafts at the rate allowed by law, on the bills of the like nature, and his costs of suit, in the State Courts of R. I., as his principal debt, and the interest is to be computed thereon as aforesaid, and the same Master is to make his report as soon as may be, and in

the mean time all further proceedings and orders are reserved for the consideration of the Court. *Bean v. Smith*, 2 Mason, 299-303.

\* (L.) *Assignment, made with intent to defeat heir, of a judgment declared void. Sale ordered of the estate still in hands of the assignees; they to unite in the conveyance. If proceeds insufficient to satisfy judgment, &c., assignees to be charged with value of the estate sold by them; just allowances of expenditures, &c., prior to judgment. Reference to Master, &c.* \* 2277

This case came on to be heard, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered and decreed, —

1. That the assignment made by S. L. to M. B. and W. L., under date of the 13th May, 1842, and which is set forth in the pleadings, be declared fraudulent and void. 2. That the real estate and all other property conveyed by the above assignment from the said S. L. to the said assignees, and unsold by them, be sold by and under the direction of the Receiver heretofore appointed in this cause, he giving such notice of the time and place of sale as is required on sales by a Master of this Court, the defendants to unite in the conveyances of the real estate and in the acknowledgments of the deeds. 3. That the proceeds of the sales, and other funds that may be in the hands of the Receiver, be paid over to the plaintiffs, in satisfaction of their judgment set forth in the pleadings, with interest and costs of this suit to be taxed. 4. If the said moneys shall be insufficient to satisfy the judgment and costs, then that the assignees be charged jointly with the value of the assigned property, real and personal, sold or disposed of by them, and with the rents and income thereof, which they received or might have received with ordinary care and diligence, after the date of the assignment, and before the property came into the possession of the Receiver; the assignees to be allowed all payments of principal and interest on incumbrances upon the property, existing prior to the judgment, all sums paid for taxes, assessments, needful repairs, insurance against fire, and other charges and expenses in the proper care and management of the property, but no commissions or costs of this suit to be allowed. 5. A reference to J. W. N., one of the Masters of this Court, to take an account upon the principles of this decree, before whom all the defendants shall appear upon summons served upon them, and produce all deeds, papers, books, and documents, and be examined on oath, on application of the plaintiffs, touching any of the matters embraced in the reference; the Master to approve the form of the conveyances to be executed; the plaintiffs to be allowed their taxed costs of this suit out of the funds; and if the same shall be insufficient to pay the judgment and interest, such costs to be paid by the assignees; and execution to issue, on confirmation of the Master's report, for the balance, if any, which the Master shall report to be due on such accounting, and for the costs of the plaintiffs; the Receiver to pass his accounts before the Master, who is to report a proper allowance for him to be by him retained out of the funds in his hands.

- \* 2278 \* (m.) *Decree in favor of heirs, declaring void a deed obtained from their ancestor by imposition, he being weak in mind and body, except as to actual advances and charges, for which the deed is allowed to stand as security.*

This cause came on to be heard by consent of counsel, at the last term of this Court, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed by the Court as follows, viz., that the deeds of conveyance dated the ninth day of May, 1805, and executed by C. W. to A. H., in the pleadings mentioned, ought not to be permitted to stand as absolute and *bona fide* conveyances to the said A. H., the same having been obtained from the said C. W. by the said A. H., by imposition upon him, he being at the time of the execution thereof in a state of great mental and bodily weakness, as well from the visitation of Providence as from his extreme old age. And it is further ordered, decreed, and declared by the Court, that, under all the circumstances of the case, the same deeds of conveyances ought to be permitted to stand as security<sup>1</sup> for any advances made, and charges incurred, and allowances due, to the said A. H., by reason of the premises stated in the pleadings, but no further; and as to all other purposes the same are to be held and decreed to be utterly void; and the same is hereby ordered and decreed accordingly.

And it is further ordered and decreed by the Court, that it be referred to A. B., Esq., a Master for this purpose, to take an account of all debts, claims, and dues between the said A. H. and the said C. W., during his lifetime; and, in taking such account, the said Master is to charge the said A. H. with all the personal estate received by him from the said C. W., including that conveyed by deed of gift to his wife, as in the pleadings mentioned, and also with all the rents and profits of said real estates; and the said A. H. is to be allowed credits for all advances made, and charges incurred, and allowances due, for labor and services to and for the said C. W. during his lifetime; and also credit for all repairs and improvements made by the said A. H., in and about the same real estates. And the said Master is also to take in like manner an account of all the rents and profits of the same real estates since the death of the said C. W., and is in like manner to be allowed credit for all repairs and improvements on the same estates during the same period. And the said Master is to give notice of his meetings, for the purpose of taking into consideration the premises, to all the parties in interest.

<sup>1</sup> Where possession had been taken of land, and improvements made, under an agreement which was not sufficient to take the case out of the Statute of Frauds, though the Court would not grant relief, on the ground of part-performance, yet the bill was retained for the purpose of affording the party a reasonable *compensation* for beneficial and lasting improvements.

Parkhurst v. Van Cortlandt, 1 John. Ch. 273. See the decree in that case. For *form of decree* where bond and mortgage had been obtained by oppression for a much larger sum than was due, ordering them to stand for security for amount due, and a re-transfer on payment of that amount, see Neilson v. M'Donald, 6 John. Ch. 201, 212.

\* And all further orders and directions are reserved until the \* 2279 coming in of the Master's report. *Harding v. Wheaton*, 2 Mason, 390-392.

(n.) *Decree setting aside a sale of a testator's share in a partnership trade, &c., by the executors, to his partners, for the purpose of being resold to one of his executors, and ordering an account of the subsequent profits, as if the partnership had continued, in favor of the estate.*

This cause came on this day [*or, this term*] to be heard, and was argued by counsel for the plaintiff and for the defendant; and thereupon, upon consideration thereof, this Court doth declare, that the sale of the said testator's interest in the copartnership concern in the pleadings mentioned is void. And this Court doth also declare that the interest of the executors of the said testator W. C. in the said copartnership concern is not yet terminated. And this Court doth order that it be referred to A. B., Esquire, one of the Masters of this Court, to inquire what is the most beneficial mode for all parties of disposing of the partnership property and effects. And the said Master is to state the same, with his opinion thereon, to the Court, and is to make a separate report thereof, with liberty to state such special circumstances as to him shall appear material, and thereupon such further order shall be made as shall be just. And it is ordered, that the said Master do take an account of the profits of the said trade, from the last settlement of accounts which the said Master shall find to have been made by the said testator or his executors, since his death. And is ordered that the said Master do take an account of all such sums of money as have been taken out of the said trade, and all such sums of money as have been paid to the executors of the said W. C. for or in respect of the said testator's interest in the said partnership business and property, by any of the parties, and state when and by whom the same have been so taken out. And it is ordered that the said Master do take an account of all sum or sums of money which shall have been advanced or paid to the executors of the said W. C. for or in respect of the alleged purchase of the said testator's interest in the said trade in the pleadings mentioned, and calculate interest at the rate of — per cent per annum upon such sum or sums as he shall find to have been so advanced and paid. And this Court doth reserve the consideration of the allowance of such interest until the account of the profits shall have been taken. And for the better taking of the said accounts, and discovery of the matters aforesaid, the parties are to be examined, &c., and to produce, &c., as the said Master shall direct, who in taking the said accounts is to make unto the parties all just allowances, and as to such of the said allowances as are claimed and objected to before the said Master, he is to state his reasons on allowing or disallowing the same. Further directions and costs reserved, and liberty to apply.<sup>1</sup> *Cook v. Collingridge, Jacob*, 607.

<sup>1</sup> See the decrees entered in *Brown v. De Tastet*, Jac. 234.

- \* 2280 \* (o.) *Decree declaring void a direction, in a devise of an estate for charitable purposes, that the rents should not be raised, and declaring that there was no resulting trust for the heir-at-law as to the increased rents, &c.*

This Court doth declare, that the directions contained in the will of M. R. the testatrix, in the pleadings named, and the rules thereto annexed, which require that the rents of her estates therein mentioned should continue the same as at the time of her decease, and that no attempts should be made to raise the same, are void, and that the defendant, C. S., the heir-at-law of the said testatrix, hath no right or interest to or in the said real estates, or the rents and profits thereof, or any part of such rents and profits, by way of resulting trust or otherwise. And the Court doth declare that the surplusage of the rents and profits, &c. And it is ordered that the information and bill as to the said C. S. be dismissed, with costs to be paid as after mentioned. And the Court doth not think proper to give any directions touching the application of any part of such surplus rents and profits, and forfeitures, &c., or to proceed further than to make such declarations of the rights of the parties as herein are contained, and such order as to costs as hereinafter given; and, subject to such declarations as are hereinbefore contained, and to such directions as to costs as are hereinafter given, the Court doth order that such information and bill be dismissed. And it is ordered that it be referred to A. B., Esq., one of, &c., to tax all parties their costs of this suit, as between solicitor and client, and also to tax in like manner the costs of the said relators and plaintiffs, and of the said defendants the said Master and Fellows, of a certain petition touching the matters in question in this suit, presented in the year 1813, to the right honorable, the Lord High Chancellor of Great Britain, therein styled visitor of the said college or hall in right of his Majesty, and of all proceedings under the said petition. And it is ordered that such several costs, when taxed, be paid by the defendants the said Master and Fellows, out of any stocks or funds in their possession which have arisen from the rents and profits of the estate of the said testatrix. *Att'y-General v. The Master and Fellows of Catherine Hall, Cambridge, Jacob, 381.*

- (p.) *Substance of a decree, setting aside a discharge of a mortgage, entered by mistake in the margin of the record thereof in the registry of deeds.*

The Court decreed that the words of discharge of the mortgage were written upon the margin of the record book in the registry of deeds by accident and mistake, and did not form an actual payment of the mortgage debt, or cancel or discharge the mortgage, but were inoperative and void, and left it in the same force and effect as before; and then the defendant and all persons claiming by, through, or

\* 2281 under \* her should be prohibited and enjoined from setting up, using, or relying upon said words of discharge, either as proof

of payment of the debt, or a discharge of the mortgage, with liberty to either party to apply to the Court hereafter.<sup>1</sup>

3. DECREE FOR SALE AND REIMBURSEMENT TO CHILDREN OUT OF THE PROCEEDS OF AN ESTATE, THE INCOME OF THE RESIDUE OF WHICH, AFTER PAYMENT OF DEBTS AND LEGACIES, HAD BEEN GIVEN TO THEM BY THE WILL OF THE TESTATOR, BUT WHICH INCOME, WITH THEIR CONSENT, HAD BEEN TAKEN TO PAY OFF THE SAID DEBTS AND LEGACIES, WHICH WERE DIRECTED BY THE TESTATOR TO BE PAID BY THE SALE OF CERTAIN OF HIS REAL ESTATE.

This cause came on to be heard upon report, and was argued by counsel, and, having been duly considered, the Court doth declare, that the plaintiffs, as equitable tenants for life under the will of the testator, F. A., are entitled to the entire income of the residue of the estates held by the defendant as trustee, subject to the deduction of all sums of money, legally paid or due as and for interest of debts and legacies, cost of repairs, taxes, and other expenses, and to a charge upon the said estates for so much of the said income as had been applied to the payment of the principal of the said debts and legacies, and to have so much of the said trust estates as may be necessary sold and applied to their reimbursement; and it appearing that the said defendant, in his capacity as trustee, has heretofore been authorized by this Court to sell, and has sold, a part of the said trust estates, and now holds the proceeds thereof, it is ordered and decreed that he shall apply so much thereof as may be necessary to their reimbursement, and the payment of all and singular any debts and legacies now remaining unpaid, and that if such proceeds should not be sufficient to make such payment in full, the defendant in his capacity as trustee shall sell at public or private sale such of the lands and tenements held by him as he may deem expedient, and apply the proceeds thereof, or so much as may be necessary, to such payment; and it is further ordered and decreed, that before proceeding to make any such sale or sales, the said defendant, trustee as aforesaid, shall give bond in such sum and with such sureties as shall be approved by one of the justices of this Court, that he will faithfully conduct the same and \*account for the proceeds; and \*2282 it is further ordered and decreed that the cost of this suit and fees of counsel, as between solicitor and client on both sides, are a charge upon the proceeds of sales now in the hands of the defendant, or hereafter to be received, and are to be paid from out thereof, and either party is at liberty to apply for further directions, and for the appointment of a Master to take the said account, if the parties do not agree thereon. *Amory v. Lowell*, 1 Allen, 508.

<sup>1</sup> *Bruce v. Bonney*, 12 Gray, 107, 113.

4. DECREE DECLARING THE VALIDITY OF A DEED TO TRANSFER THE ESTATE NAMED IN IT, AND ORDERING THAT THE GRANTEES BE LET INTO POSSESSION OF THE PREMISES, AND THAT THEY BE ALLOWED TO HAVE AND ENJOY THE RENTS, PROFITS, AND INCOME THEREOF.

That the deed of conveyance from the defendants J. A. and E. A., his then wife, to the defendants D. W. C. and R. D. A., bearing date the 25th November, 1805, mentioned and set forth in the pleadings and proofs in this cause, was duly executed and delivered by J. A. and E. A., his then wife, on the 25th December, 1805, so as to pass the estate and interest in the messuage and premises therein described, to the defendants D. W. C. and R. D. A., and to vest the same in them, to the uses, and upon the trusts, therein mentioned; and the deed of conveyance is hereby declared valid and effectual in the law, accordingly. And it is further ordered, adjudged, and decreed, that the plaintiffs S. M. S. and E. B. S. his wife, in her right, be forthwith let into possession of the premises mentioned and described in the deed of conveyance from the defendants J. A. and E. A., his then wife, to the defendants D. W. C. and R. D. A., bearing date the 25th November, 1805, and into the perception of the rents and profits thereof, in arrear and unpaid, and hereafter to accrue and become payable, or that D. W. C. and R. D. A. be immediately let into possession thereof, as trustees, upon the trusts, and to the uses, in the deed expressed and declared, of and concerning the same. And in case D. W. C. and R. D. A., or the survivor of them, shall take possession of the premises, they, or the survivor of them, shall receive and take the rents and profits thereof, in arrear and unpaid, and which shall hereafter accrue, and become payable, in trust for, and pay over the same from time to time, to S. M. S. and E. B. S., his wife, in her right, during their joint lives, to E. B. S., during her life, if she shall survive S. M. S., her husband; or they, D. W. C. and R. D. A., and the survivor of them, shall permit S. M. S. and E. B. S., his wife, in her right, to take the rents and profits during their joint lives; and that E. B. S. is to take the same during her life, if she shall survive her husband, and after the death of E. B.

\* 2283 \* S., one of the plaintiffs, the rents and profits of the premises shall be received, paid, and applied, according to the uses and trusts in the before-mentioned deed of conveyance, bearing date the 25th November, 1805, limited and declared. And that the trustees, or the survivor of them, and any other person then claiming an interest therein, under the deed of conveyance, shall be at liberty to apply to this Court for its direction in that behalf. And it is further ordered, adjudged, and decreed, that the defendants D. W. C. and R. D. A. shall, within twenty days after notice of this decree, cause the deed of conveyance to be acknowledged, or proved, and recorded according to law, for the greater safety of the title of the plaintiffs in this cause to the premises therein contained, and all others who may become interested therein. And it is further ordered, adjudged, and decreed, that the plaintiffs, during their joint lives, and E. B. S., after the death of S. M. S., her



husband, if she shall survive him, shall be at liberty to use the names of the trustees, or the survivor of them, and to have the use of the deed of conveyance for the purpose of prosecuting at Law, or taking any reasonable measures, to obtain the possession of the premises, and for receiving the rents and profits thereof, according to their and her rights to the same, as hereinbefore declared and adjudged. And it is further ordered, adjudged, and decreed, that the defendant J. A. account with the plaintiffs in this cause, for the rents and profits of the premises, from the twenty-third day of January, 1809, and that it be referred to one of the Masters in Chancery to take the account accordingly; and that in taking the account, the Master charge J. A. with the rents of the premises received, or which, without wilful default, might have been received for the same; and that the Master make all just allowances to J. A. for taxes and repairs; and that the Master shall take the account, and report thereon to the Court, with all convenient speed. And it is further ordered, that the question of costs, and all further directions, be reserved until the report shall come in. *Souverbye v. Arden*, 1 John. Ch. 258-260.

5. DECREE ANNULING PROCEEDINGS UNDER ONE PETITION IN INSOLVENCY, AND DIRECTING A WARRANT TO BE ISSUED ON ANOTHER.

E—, ss. }  
S. J. C. }

G. T. L. *et al.* v. G. F. C. *et al.*

This cause came on to be heard upon the pleadings and proofs in the cause, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed by the Court,

\* That the warrant issued by the Hon. G. F. C., Judge of Pro- \* 2284  
bate and Insolvency in and for said county of E., on the petition of B. P. W., described in the petition in this cause and all the subsequent proceedings on said petition of said B. P. W. and all proceedings on said warrant be and the same are hereby vacated, annulled, and made of no effect, and the injunctions issued in this cause are hereby made perpetual, and said petition of said B. P. W. is hereby dismissed.

It is further ordered, adjudged, and decreed, that the order or decree of said Judge dismissing the petition of G. T. L., described in the petition in this cause, in which petition so dismissed said G. T. L. represented said B. P. W. and himself, said G. T. L. and W. R. W. to be general partners under the firm of W. and L., and prayed that a warrant in insolvency might be issued for taking possession of their estate, and that such further proceedings might be had in the premises as the law in such cases prescribed, be, and the same is, hereby reversed and annulled, and said Judge is hereby commanded and directed to issue forthwith upon said petition of said Lancaster, and in pursuance of the prayer thereof, a warrant in insolvency in due form under the hand of said Judge and the seal of his Court against said W. L. and W. as general partners, composing the firm of W. and L., as insolvent debtors, and against their joint and separate estates, and to do all such other acts,

and direct all such further proceedings in the case as the insolvent laws in such cases prescribe.

And it is further ordered and decreed, that an attested copy of this decree be transmitted to the said Judge for his government and direction.

And it is further ordered, that this case be reserved for the further consideration and decree of this Court, upon the question of costs to be allowed to the petitioners. *Lancaster v. Choate*, 5 Allen, 530.

By the Court.

Attest, A. H.

By B. and B.,  
*their Attorneys.*

At Chambers in B., May 30, 1863.

It is now ordered, as part of the final decree in the above-entitled cause, that there be allowed the sum of seven hundred and four dollars and seventy-five cents (\$704.75) as costs in these proceedings, to be paid out of the joint estate of said W. and L. by the assignees, who may be hereafter chosen, to the counsel of the petitioning creditors.

## PARTICULAR PERSONS.

## 1. FEMES COVERT.

*(a.) Sale of stock and payment to wife's separate use.*

It is ordered and decreed, that the \$—— (*stock*) standing, &c., in trust in this cause (the account of, &c.), be sold, and that the money to arise by such sale, and \$—— cash in the ——, to the credit of this cause (the like account, &c.), and any interest, &c., be paid to B., the wife of N., for her separate use.

*(b.) Payment to divorced woman.*

The Court doth order that the money to arise by the sale of the said —— be paid to the petitioner K. (*maiden name*), formerly the wife of B., but now unmarried, having been judicially divorced, on her sole receipt.

*(c.) Inquiry, whether any settlement, and if proper, and if not, direction for settlement.*

The Court doth order that it be referred to, &c., to inquire whether (the plaintiff *or* defendant) A. has made any and what settlement or provision for (the plaintiff *or* defendant) B., his wife, and the issue of their marriage, or entered into any and what agreement for that purpose; and, if so, whether the same is a fit and proper settlement or provision for the said (plaintiff *or* defendant) B., and such issue. And if it shall appear that the said (plaintiff *or* defendant) has not made any such settlement or provision, or that such settlement or provision, if any, is not fit and proper, the Court doth order that a proper settlement, to be made by the said (plaintiff *or* defendant) A., on, &c., be approved by the, &c. 2 Seton Dec. (Eng. ed. 1862) 665.

*(d.) Share settled by order, without deed — husband bankrupt.<sup>1</sup>*

The Court doth order that the residue of the said \$——, &c., be carried over in trust in this cause, "The account of the settlement of the

<sup>1</sup> For *form of a decree* ordering a maintenance for a wife out of her property, where she was abandoned by her husband, or pre-

vented by his ill-treatment from cohabiting with him, see *Dumond v. Magee*, 4 John. Ch. 318, 325-328.

defendant C., the wife of W., and her children;" and the Court doth declare that the, &c., so to be carried over are to be held in trust for the said defendant C. for her life, and during her present cover-  
 \* 2286 ture, \* for her separate use, without power of anticipation, and after her decease in trust for all the children of her present marriage who shall attain the age of twenty-one years, or being daughters shall (attain that age or) marry under that age, equally, and if there shall be no such child, and the defendant C. shall survive the said W., her present husband, in trust for her, her executors, administrators, and assigns; but if she shall die in the lifetime of her said husband, without any child, in trust for the defendants P. and D., as the assignees of his estate and effects; and the Court doth order that the interest during the life of the said defendant C., from time to time to accrue due on, &c., so to be carried over be, as the same accrue due, paid to the said defendant C., the wife of the said W., for her separate use, or until further order. 1 Seton Dec. (Eng. ed. 1862) 665, 666, and notes.

(e.) *Decree ordering a trustee under a marriage settlement, of a married woman, who was insane, and whose husband was her guardian, to contribute from the trust property secured to her sole and separate use towards the expense of her support, on bill by the husband.*

The cause having come before the full Court for a final hearing upon the bill, answers, and facts agreed, and the parties, by their respective counsel, having been fully heard, it is ordered and decreed that the said H. D., trustee of the said J. E. D., pay to the said W. W. D., guardian of the said J. E. D., the sum of four hundred dollars, the same to be paid in thirty days after the filing of this decree; and that he afterwards pay to the said W. W. D. the sum of four hundred dollars annually from the time of filing this decree, till the further order of the Court; the same to be paid in equal half-yearly instalments; the said sums to be paid out of the income of the trust property in the hands of the said H. D.

It is further ordered and decreed, that the costs of this suit, and the reasonable charges of counsel, to be approved and allowed by the Court, be paid by said H. D. out of said income.

In default of payment by said H. D. of said sum of four hundred dollars, and the costs and expenses hereinbefore mentioned, according to the terms of this decree, within thirty days as aforesaid, it is ordered that an execution issue for the same in due form of law.

It is further ordered and decreed, that the said W. W. D. apply the several sums as aforesaid, except the said costs and charges, to the support and maintenance of the said J. E. D., so that, in addition to what shall be furnished for her by him out of his private property, she may be supplied with everything that ought reasonably to be provided for her comfort and convenience. *Davenport v. Davenport*, 5 Allen, 464.

By the Court.

Boston, Jan. 16, 1863.

(Signed)

G. C. W., Clerk.

\*(f.) *Assignment of dower; commissioners; inquiries.* \* 2287

Ellick Powell and Wife v. The Monson and Brimfield Manuf. Co.

This cause came on to be heard at the, &c., on the bill and answer, and was argued by counsel. Whereupon it is ordered, adjudged, and decreed, that the said Ellick and Elizabeth, in her right, have as her dower, of the endowment of R. M., her late husband, now deceased, one just third part of the lands, tenements, and hereditaments herein-after mentioned, exclusive of the increased value of the same, arising from or caused by the buildings erected and improvements made upon said lands and tenements, &c., or any one of them, since the alienation thereof by the said M.; viz., of one certain tract of land, &c., &c.

And it is further ordered and decreed, that the said Ellick and Elizabeth have and recover their reasonable damages by reason of the detention of her dower in the premises, from and after the third day of March, A. D. 1823, when they demanded of the defendants that they should assign and set out to the said Elizabeth her said dower in said lands, tenements, and hereditaments, until the present time. And that the plaintiffs recover of the defendants their legal costs of this suit, to be taxed by the Court. And it is further ordered and decreed, that this bill be dismissed as to all the other lands and tenements mentioned in said bill, and the said Ellick and Elizabeth's claim, in her right of dower in the same, or any or either of them.

And it is further ordered and decreed, that commissioners be appointed to inquire, ascertain, act, and report, as soon as may be, on the matters following, viz., —

1. The several and respective times when the said R. M. alienated the above-described lands, tenements, and hereditaments, and any parcels or undivided parts thereof.

2. The present value of said lands, &c., exclusive of the increased value occasioned by the buildings and improvements on the premises, since the alienation thereof, by the said R. M.; and also the reasonable damages by reason of the detention of her dower in the premises from and after the third day of March, A. D. 1823, to the present time.

3. If the commissioners shall find that one-third part of said lands, &c., can be assigned and set off to said Elizabeth, by metes and bounds, without great prejudice to the same, then, that they proceed to assign and set off to the said Elizabeth one just third part of said lands, &c., exclusive of the increased value thereof, occasioned by the buildings erected, and improvements made thereon since the alienation thereof by said R. M., meaning so much and such part of said lands, &c., as would be equal in value to one just third part thereof at the \* present time, in case no buildings had been erected or im- \* 2288  
provements made thereon since the alienation thereof by the said R. M.

4. If the commissioners shall find that one-third part of said lands, &c., cannot be assigned and set off to said Elizabeth, as aforesaid, to

hold in severalty by metes and bounds, without inconvenience and prejudice to the same, then, that they inquire and ascertain, and report to the Court, the yearly amount and value of the rents, profits, and income of said lands, &c., exclusive of the increased value arising from, and occasioned by, the buildings erected, and improvements made thereon, since the alienation thereof by said R. M., meaning the true yearly amount and value of the rents, profits, and income which the said lands, &c., would now yield, in case no buildings had been erected or improvements made thereon since the alienation thereof by the said R. M. *Powell et ux. v. Monson and Brimfield Manuf. Co.*, 3 Mason C. C. 347.

[*Second decree in the above case.*]

This cause coming on again to be considered upon the report made by the commissioners appointed to assign dower in the premises, two exceptions were taken in behalf of the respondents to said report, viz.: 1. That the commissioners erred in not considering "the mortgage to R. F., of October 21, 1808, in the pleadings mentioned as an alienation by the said R. M., so as to affect the right of his wife to dower." 2. That the commissioners erred in considering "the water-wheel and the main gearing of the factory as real estate." The exceptions were thereupon argued by counsel for both parties. On consideration thereof, and of the premises, it is ordered, adjudged, and decreed by the Court, that the said exceptions be, and they hereby are, overruled; and that the same report do, in these respects, stand confirmed. And further, that the dower therein assigned to the plaintiffs by the commissioners, firstly in their report, upon the ground that they were right in their opinion on the points above excepted to, be, and hereby is, confirmed and assigned to the plaintiffs accordingly; and that the same report do, in all other respects, stand confirmed. And it is further ordered, adjudged, and decreed, that the defendants do deliver possession of the premises so assigned to the plaintiffs accordingly, and do, in all other respects, perform this decree; that the plaintiffs do recover their reasonable costs in the premises, taxed at \$345.75. 3 Mason C. C. 468, 469.

For forms of decrees respecting the liability of the wife's separate estate for her debts by note, and as surety, see 2 Seton Dec. (Eng. ed. 1862) 678, 679.

\* 2289 \* (g.) *Alimony on a decree of divorce from bed and board; other directions, custody of child.*

"It appearing, from the pleadings and proofs, that the defendant has been guilty of cruel and inhuman treatment of the plaintiff, by repeated acts of personal violence, so as to render it unsafe and improper, under existing circumstances, for her to cohabit with him, or to be under his dominion and control, it is thereupon ordered, &c., that the plaintiff and defendant be separated from bed and board forever, provided, however, that the parties may, at any time hereafter, by their joint and mutual,

free, and voluntary act, apply to the Court for leave to be discharged from this decretal order. And it is hereby declared to be the duty of each of them to live chastely during their separation, and that it will be criminal, and an act void in law, for either of them, during the life of the other, to contract matrimony with any other person. And it is further ordered, &c., that the plaintiff, according to the prayer of her bill, shall be entitled to and be charged with, the custody, care, and education of the infant son of the parties in the pleadings mentioned, provided always, that this order for the custody, care, and education of the said infant may, at any time hereafter, be modified, varied, or annulled, upon sufficient cause shown. And it is further ordered, &c., that the defendant pay to the plaintiff \$200 a year, to be computed from the date of this decree, in half-yearly payments, to be applied towards the support and maintenance of the plaintiff and her son, and that this allowance is to continue until further order, and be subject to variation, as future circumstances may require. And it is further ordered, that the defendant pay to the plaintiff the costs of this suit, to be taxed, and that she have execution thereupon, according to the course and practice of the Court.” <sup>4</sup> *Barrere v. Barrere*, 4 John. Ch. 187.

(h.) *Minutes of a decree, charging the separate estate of a married woman with the payment of her debt, and varying former decree.*

“MINUTES. — Vary decree. Declare separate property of Sophia Hine, vested at this present date in her, or in any other person in trust for her, chargeable with the payment of the £225 and interest, and charge the same accordingly. Take account of what is due to the plaintiff. Inquire of what the separate property consists at the present time, and in whom it is vested. Inquire as to rates and taxes on house, and let Fish” (*the trustee, who with the husband were the defendants*) “be at liberty to retain his costs out of the separate property in his hands. Reserve for the consideration. Liberty to apply.” *Picard v. Hine*, L. R. 5 Ch. App. 274, 278.

\* 2. INFANTS.

\* 2290

*Showing cause against decree.*

(a.) *Decree nisi against infant.*

And this decree is to be binding on the defendants, the infants, unless they shall respectively, within six months after attaining their respective ages of twenty-one years, on being served with *subpoena* to show cause against this decree, show unto this Court good cause to the contrary. 2 Seton Dec. (Eng. ed. 1862) 685.

(b.) *Another form.*

“And it is further ordered, that the said defendants H. O. H. and S. S. H., respectively do, as and when they shall respectively attain the age of

<sup>1</sup> See another form on decree of divorce *à vinculo*, in *Miller v. Miller*, 6 John. Ch. 91, 93.

twenty-one years, execute, acknowledge, and deliver sufficient deeds of release of the estate in C. Square and near B. Street, to said M. K., his heirs or assigns, and of the said estate in C. Street, to said J. L., his heirs or assigns, unless the said H. O. H. and S. S. H. respectively shall, within six months after they shall have respectively attained said age of twenty-one years [on being served with *subpœna* to show cause against this decree], show unto this Court good cause to the contrary; and in the mean time it is ordered that the said purchasers of said estates, and their respective heirs and assigns, do hold and enjoy the said estates by them respectively purchased, and to them respectively conveyed by said deeds of said Master. *Kelley v. Greenleaf*, 3 Story C. C. 93.

(c.) *Decree absolute against infant.*

Upon motion, &c., by counsel for the plaintiff, who alleged, that the defendant A. attained the age of twenty-one years on the — day of —, and that the said defendant was on the — day of — duly served with a *subpœna* to show cause against the decree made in this cause, dated, &c., as by the affidavit of, &c., filed, &c., appears, and no cause having been shown to the contrary thereof, as by the —'s certificate also appears, and upon reading, &c., this Court doth order that the said decree be made absolute against the said defendant A. 2 Seton Dec. (Eng. ed. 1862) 685.

(d.) *Decree for absolute foreclosure against infant and feme covert, plaintiff paying their costs, and Court deeming it for their benefit.*

And the plaintiff by his counsel offering to pay unto the defendants S. and L. his wife, and G., the infant, their costs of this cause as between solicitor and client, upon an absolute decree of fore-  
 \* 2291 closure being now made as against them; and the \* defendant S. by his counsel disclaiming all interest in the estate comprised in the indenture of mortgage in the pleadings mentioned, dated, &c., and consenting to an absolute decree; and counsel for the defendant L., the wife of the said S., and for the defendant G., the infant, not asking for liberty to redeem the mortgaged premises, or for any account of what is due to the plaintiff, the court doth declare that it will be for the benefit of the defendant L., and of the said infant G., to accept the said offer; and doth order that the defendant S., and L., his wife, and the defendant G., the infant, from henceforth stand absolutely debarred and foreclosed, &c.; and that the plaintiff B. pay unto the said defendants respectively their costs of this cause, to be taxed, &c. *Billson v. Scott*, 1856, 2 Seton Dec. (Eng. ed. 1862) 685, 686.

(e.) *Infants declared not bound by decree; accounts; former accounts to be adopted if beneficial.*

This Court doth "declare, that the plaintiffs are entitled to the benefit of the decree dated, &c., and the several proceedings under the same, and subsequent or previous thereto, against all the defendants to



this (*supplemental*) cause, except the infant defendant H., the only son of the defendant J., and the first tenant in tail *in esse* under the testator's will; and doth also declare that the said decree and orders, and the accounts taken under the same, are not binding on the said defendant, the infant."— Usual accounts of personalty, and inquiries as to realty, any accounts settled in testator's lifetime not to be disturbed. — "And if it shall appear to be for the benefit of the infant defendant H. to adopt any of the accounts already taken under the decree and orders in the original cause, such accounts are to be adopted to such extent, or in such respects as shall appear to be for the benefit of the said infant defendant."— And this decree is to be without prejudice as between the plaintiff and all the defendants, except the said infant, to any of the decrees and orders, proceedings, and arrangements, made prior to the date hereof. Adjourn, &c. 2 Seton Dec. (Eng. ed. 1862) 690, 691; *Baillie v. Jackson*, 10 Sim. 167.

*Directions as to shares and income.*

(f.) *Inquiries as to advances, and maintenance, and shares.*

The Court doth order that it be referred to, &c., to make the following inquiries, that is to say, "1. An inquiry, whether the testator in his lifetime gave, advanced, or settled in, for, or upon any, and which of his children, any sum or sums of money, or other property; and if so, what was the amount or value thereof; 2. An inquiry, whether any \*and what payments, appropriations, or advances have \*2292 been made by the executors of the will of the testator, since his death, to or on account of the children of the testator, or any, or which of them, in respect of their shares of his residuary estate, or otherwise; 3. An inquiry of what the residuary, personal, and real estate of the testator consisted."— 4. An inquiry, as to allowance for past and future maintenance and advancement in life of the children of the testator, or any of them, and if so, to whom the same is due. 2 Seton Dec. (Eng. ed. 1862) 698.

*Guardian, maintenance, and education.*

(g.) *Guardian of person and maintenance.*

(This, &c.) appoint B., of, &c., guardian of the person of A., the infant, during his minority, or until further order; and it is ordered by the Court that the sum of \$ — a year be allowed for the maintenance and education of the said infant for the time past, from the — day of —, the time of the death of C., his father, and for the time to come during his minority; and be paid to the said B., his guardian, during his minority, or until further order, by equal half-yearly payments, of \$ — each, on the — day of —, and the — day of —, in each year, the first of such payments to be made on the — day of —, out of the interest from time to time to accrue due on the &c.

Standing, &c. [*or*, by the Receiver, appointed in this cause, out of the rents and profits of the estates of said A., the infant]; and let such payments be allowed the said Receiver from time to time in passing his accounts. 2 Seton Dec. (Eng. ed. 1862) 700.

(h.) *Order for increase of maintenance.*

It is ordered that the sum of \$ —— a year be allowed in addition to the said sum of \$ —— a year, allowed by the order dated, &c., making together the sum of \$ —— a year, for the maintenance and education of A., the infant, for the time to come during his minority [*or*, such increase allowance to commence on, *or*, as from]; and to be paid to, &c.<sup>1</sup> [*as in next form above*].

(i.) *Devise of maintenance of lunatic out of profits insufficient; sale ordered.*

It is declared, that the estate in the pleadings mentioned is charged with the comfortable and reasonable maintenance of *Nelly S.*; and that, if the farm will not, upon lease, yield sufficient for that purpose, \* 2293 \* the same may and ought to be sold, and the proceeds applied for her support; and that a Master be directed to inquire, and report, what annual sum is requisite for the comfortable and reasonable maintenance of *Nelly S.*, and what is the net value of the yearly rents and profits of the estate, as the same now exists, and may be rented. *Schermerhorne v. Schermerhorne*, 6 John. Ch. 74.

*Custody of infants.*

(j.) *Custody of infants committed to mother; guardians; provision; father excluded except at stated time.*

On petition of the mother and her brother and next friend, and of the infants by the same next friend. It is ordered that “M. and J., the infants, remain in the care and custody of the petitioner E., their mother.” — Appoint petitioner E. and F. (*next friend*) to act in the nature of guardians to the infants till further order. — And it is ordered, that the petitioner E. have the charge and superintendence of the education of the said infants, and said petitioner E. and the said F., by their counsel, undertaking that, until the further order of this Court, they will duly and properly provide for the care, maintenance and education of the said infants. And it is further ordered that “Y., the father of the said infants, have access not oftener than once in three months, to see the said infants, at his own expense, in the presence of such person as the said E. may appoint, within one mile of their residence in England, for the time being.” Liberty to apply.<sup>1</sup> 2 Seton Dec. (Eng. ed. 1862) 714.

<sup>1</sup> For inquiries in regard to ability of father to maintain infant, see *Kekewich v. Langston*, 11 Sim. 291, 305. Payment of infant's maintenance to father, see *Bateman v. Foster*, 1 Col.

C. C. 127; *Meacher v. Young*, 2 My. & K. 490. To mother, see *Fentiman v. Fentiman*, 13 Sim. 171.

<sup>1</sup> For orders respecting the care and custody

(k.) *Order for habeas on motion.*

It is ordered that a writ of *habeas corpus* issue, directing (directed to) the defendants B. and M. his wife to bring into this Court the plaintiffs M., F., and J., the infant children of J. L., at the sitting of this Court, at, &c., on the — day of —. 2 Seton Dec. (Eng. ed. 1862) 718.<sup>2</sup>

*Leave to take infant out of jurisdiction.*<sup>3</sup>

(l.) *Residence abroad.*

The Court doth order that the petitioner, the father of the infant plaintiffs, be at liberty to remove the said infants with him to —, or to any other parts and places beyond the seas, and out of the jurisdiction \* of this Court, in which he shall, in the execution \* 2294 of his duty, be ordered or find it necessary to reside, there to remain with the petitioner if he shall so think fit; the petitioner, by his said petition (counsel), undertaking to bring the said infants or such of them as shall then be living, back with him on his return to this country, on the fulfilment of his mission in the petition mentioned, unless the petitioner shall in the mean time, from any unforeseen circumstance, deem it advisable to send them, or any of them, back to this country; but the petitioner is half-yearly to transmit, properly vouched, to be laid before the Court, the plan of tuition and education for each of the said infants, actually adopted and in practice at the time of such half-yearly return, and specifying particularly where and with whom they reside.<sup>1</sup> Jackson v. Hankey, Jacob, 265 n.

### 3. EXECUTORS AND TRUSTEES.

*Accounts.*

(a.) *Against executors of sole executor.*

It is ordered that it be referred to, &c., to take an account of the personal estate, not specifically bequeathed, of A., the testator in the pleadings named, come to the hands of (received by) B., deceased, the sole executor of his will, and of (by) the defendants C. and D. [*or*, C., D., and E.] the executors of the will of the said B., since his decease, or either [*or*, any] of them, or of (by) any other person or persons, by the order, or for the use of the said B., or of the said defendants, or either [*or*, any] of them; and it is ordered and decreed that what, on taking the said account, shall appear to be due from the defendants,

of children, see *Re Bartlett*, 2 Col. 661; *Hope v. Hope*, 4 DeG. M. & G. 355; *Wellesley v. Beaufort*, 2 Russ. 44.

<sup>2</sup> For form of order by the Court where infant brought up on *habeas*, see *Matter of Wollstonecraft*, 4 John. Ch. 83.

<sup>3</sup> Although the Court will, under special circumstances, allow an infant ward to go out

of the jurisdiction, yet it will not compel the removal of an infant ward out of the jurisdiction. *Dawson v. Joy*, 3 De G. M. & G. 764.

<sup>1</sup> For orders for maintenance of infants out of the jurisdiction, see *Stephens v. James*, 1 My. & K. 627; *Wyndham v. Ennismore*, 1 Keen, 468; *De Weever v. Rochport*, 6 Beav. 391.

C. and D. [*or*, C., D., and E.], be answered by them personally, and what shall appear to be due from the estate of the said B., deceased, be answered by the defendants C. and D. [*or*, C., D., and E.], as such executors, they having admitted assets of the said B., for that purpose; [*or, if assets not admitted*, out of his assets in the course of administration; and in case the said defendants shall not admit assets of the said B. for that purpose, then it is ordered that an account be taken of the personal estate of the said B., come to the hands of (received by) the defendants C. and D., *or*, C., D., and E., *or* either, *or*, any of them, *or* of (by) any other person or persons, by the order, *or* for the use of the said defendants, *or* either, *or* any of them.]<sup>2</sup> 2 Seton Dec.

\* 2295 (Eng. \* ed. 1862) 735. For form of supplemental decree against administrator of executrix and administrator *de bonis non*, see *Ib.* 736.

### *Breach of trust.*

#### *(b.) Investment declared improper.*

Decree to perform will, and administer testator's estate: "And it is declared, that the investment of any part of the personal estate of the testator by the defendant C., either by way of loan upon the deposit of, &c., &c. [*foreign or other securities*], was an improper investment; and in taking the accounts of the personal estate of the testator not specifically bequeathed, come to the hands of the defendant C., regard is to be had to the foregoing declaration." *Knott v. Cottee*, 16 Beav. 77; 2 Seton Dec. (Eng. ed. 1862) 748.

#### *(c.) Improper investment made good by instalments, without prejudice to appeal; security to be realized.*

It is declared by the Court, that the investment of the sum of \$7320, in the pleadings mentioned, on the security of the estates comprised in the indenture of, &c., in the pleadings mentioned, was, so far as regards the plaintiff, a breach of trust on the part of the defendant A. Directions by arrangement for defendant A. to make good plaintiff's share of fraud, with interest at — per cent by instalment. "And in default of such payments as aforesaid, or any of them, and in case the mortgage security in the pleadings mentioned shall not have been previously realized, it is ordered that the same be realized; and, for that purpose, it is ordered, that the plaintiff, after any such default, be at liberty to make such applications as she may be advised to the commissioners for sale of, &c.; and that the defendant A. and the plaintiff be at liberty to bid at the sale; and it is declared by the Court, that in case of any such default, the plaintiff, out of such part of the money arising from any

<sup>2</sup> A creditor may come into a Court of Chancery against an executor or administrator, for a discovery and distribution of assets.

*Thompson v. Brown*, 4 John. Ch. 619. A very particular and extended form of decree for account is reported in this case.

sale, as shall bear to the whole produce of the sale the proportion of \$3965, to \$7320, is entitled to be paid the amount then due to her." — Defendant A. to pay plaintiff's costs of suit, to be taxed. — "And by consent of the plaintiff (by her counsel), any consent or admission on the part of the defendant A., or other matter herein contained, is not to prejudice or affect any right of appeal by or on the part of the defendant A." 2 Seton Dec. 748, 749.

(d.) *Debentures fraudulently disposed of by trustee without concurrence of co-trustee, to be deposited in Court by alleged purchaser; account of interest.*

It is ordered that "the defendant L. (*purchaser*) on or before, &c., deposit in a tin box, under lock and key, in the presence of plaintiff's solicitor, Mr. —, the two debentures of the — Railway Co., and the \* remaining coupons attached or belonging thereto, num- \* 2296 bered respectively, &c., in the bill mentioned; and that such box be indorsed, 'In Chancery, G. v. P., Securities'; and that the defendant L., on or before, &c., deposit such box in the bank, &c., to the credit of this cause, subject, &c." Account of interest on the said debentures received by defendants P., R., and L. [*in whose hands the debentures had been*], or any of them, and they to pay to the plaintiff what shall be found due from them respectively; defendants, including D. (*fraudulent trustee*), to pay plaintiff's cost of suit; defendant L. only so far as they are increased by making him defendant. — Liberty to apply. 2 Seton Dec. (Eng. ed. 1862) 749.

(e.) *Inquiry as to wilful default; bankrupt or insolvent trustee.*

It is ordered that it be referred to, &c., to take the account and make the inquiry following, that is to say: 1. An account of all such of the moneys or funds comprised in the indenture dated, &c., in the pleadings mentioned, or from time to time subject to the trusts thereof, as have been procured or received by the defendant C. (*bankrupt or insolvent debtor*), or by any person, &c., or which, without his wilful (neglect and) default, have been so possessed or received, and of his dealings with and investments of such moneys or funds, and of his application and disposition thereof, and of the dividends, interest, and annual proceeds thereof; 2. An inquiry, whether anything, and what, is due from the defendant or his estate in respect thereof. Adjourn, &c. 2 Seton Dec. 751.

(f.) *Further order for leave to prove the balance.*

It is ordered that the plaintiff be at liberty to go in and prove against the estate of the defendant C. the bankrupt [*or, the insolvent debtor*],

under the adjudication in bankruptcy [*or*, proceedings in insolvency] against the said defendant for the sum of \$—, the balance appearing by the Master's report, dated, &c., to be due from him or his estate in respect of the money or funds comprised in the indenture dated, &c., or at any time subject to the trusts thereof, and also for the dividends, interest, and annual proceeds thereof, and for the plaintiff's costs in this cause, to be taxed, &c.; but so as not to disturb any dividend already declared. Liberty to apply. 2 Seton Dec. (Eng. ed. 1862) 751.

(g.) *Account and inquiry as to the trust funds under two settlements.*<sup>1</sup>

It is ordered that "the decree, dated, &c., be varied; and it is further ordered and decreed that it be referred to, &c., to take the following account and make the following inquiry, that is to say: 1. An \*2297 account \* of the trust funds and property come to the hands of the plaintiff as trustee under each of the indentures of settlement, dated respectively, &c., in the pleadings mentioned, either solely or jointly with his co-trustee or co-trustees, under the said indentures respectively; 2. An inquiry, whether the said trust funds and property are now in the possession of the trustees respectively, and whether in the same state of investment as at the time when such trust funds and property came into the hands of the said trustees, or in any other and what state of investment; but such account and inquiry respectively are not to extend to the income of the said trust funds and property." So much of the decree as directs the taxation and payment and apportionment of costs to be reversed; reserve the consideration of the costs of suit, and of the account and inquiry hereby directed; costs of appeal to be costs in the cause. Adjourn, &c. 2 Seton Dec. (Eng. ed. 1862) 751.

(h.) *Inquiry if executors have recovered moneys.*

It is ordered that it be referred to, &c., to make an inquiry, what part of the personal estate comprised in and assigned by the indenture of settlement dated, &c., in, &c., came to the hands of S. and R., the trustees of the said settlement; and what funds were in the hands of the said trustees at the death of E., the testatrix in, &c., and what has become of all such funds as came to the hands of the said trustees, and whether the same or any, and which of them, might have been recovered from the said trustee by M. and T., the executors of the said E., after the decease of the said E.<sup>1</sup> 2 Seton Dec. (Eng. ed. 1862) 752.

<sup>1</sup> For a form of decree vacating a purchase of an estate, by the trustee for selling and ordering a resale, &c. see *Davoue v. Fanning*, 2 John. Ch. 271.

<sup>1</sup> A trustee who suffers funds to pass improperly into the hands of his co-trustee, is chargeable for any loss arising from such negligence or abuse of trust. *Mumford v. Murray*,

6 John. Ch. 1. So a defendant, who suffered moneys received under an order in favor of himself and the plaintiff, as partners, to be blended with moneys received by him under a subsequent *trust deed* to him and another, to pass into the hands of his co-trustee, was held accountable to the plaintiff, notwithstanding the plaintiff, as one of the *cestui que trusts*, had

*Charging with interest.*

(i.) *Inquiry as to employment of balances.*

It is ordered that it be referred to, &c., to inquire and report "how and in what manner the personal estate of the testator possessed by \* (come to the hands of) the defendant C., has been employed \* 2298 by him, and what balances in respect thereof have remained in his hands, and during what time respectively."

(j.) *Directions for annual rests and compound interest.*

Accounts of personal estate; personalty not specifically bequeathed to be applied to pay debts and legacies. "And let the balance of the residuary personal estate of the testator in the hands of the defendant W. at the death of C., in the pleadings named, be ascertained; and let annual rests be made of the clear balance of such personal estate in the hands of the defendant W. since the death of the said C.; and let interest be computed on the balance which shall be ascertained as aforesaid, at the rate of — per cent per annum, and in making such annual rests (except the first) the interest of each preceding balance is to be included in the balance then stated, so as to charge the said defendant with compound interest thereon." Account of rents and profits since the death of the said C. received by defendants W. and S., &c.; and in taking such account, annual rests are to be made of the clear balance of such rents and profits in the hands of the defendant W.; and let interest be computed on such respective balances at the rate of — per cent per annum; and in making such annual rests, except the first, the interest of each preceding balance is to be included in the balance then stated, so as to charge the said defendant W. with compound interest thereon. *Cotham v. West*, 1 Beav. 381. 2 Seton Dec. (Eng. ed. 1862) 762.

*Costs and expenses.*

(k.) *Costs, charges, and expenses, beyond costs of suit.*

It is ordered that it be referred to, &c., to tax the costs of the plaintiffs and defendants (all parties) of this cause, the costs of the defend-

joined in a discharge of such co-trustee, but without a knowledge of the fact of the first money being so blended with moneys received under the trust deed. *Mumford v. Murray, supra*. A trustee who mingles the trust money with his own, and uses it as his own, must pay interest. *Mumford v. Murray, supra*. See this case for the outlines of a decree involving a consideration of the above points. Where an administrator of a deceased partner, without applying to the Court for its direction, permitted the surviving partner to sell the joint stock in the usual course of trade, for the joint benefit of himself and the intestate's estate,

and put into the hands of such surviving partner, *assets* which the administrator had in his own hands, and under his own control to trade with, he was held answerable for the loss. *Thompson v. Brown*, 4 John. Ch. 619. See form of decree in this case. Where a trustee, though called on for that purpose, refused to exhibit to referees appointed by the Court, by consent of parties, an account of the rents and profits of certain parts of the trust estate, he was held chargeable with what, in the opinion of the referees, such parts of the estate would reasonably have produced. *Green v. Winter*, 1 John. Ch. 26, and Form of Decree, pp. 42-44.

ants B. & C., the executors of the will of A., the testator in the pleadings named [*or*, the trustees of the will of, &c., *or*, of the indenture, dated, &c., *or*, of the legacy, &c., in the pleadings, &c., mentioned] as between solicitor and client [*if so, add*, incurred subsequent to the last taxation], including in such taxation any costs, charges, and expenses, properly incurred by them, relating to the administration of the testator's estate [*or*, the execution of the trusts of the testator's will, *or* the said indenture, *or* the said legacy, *or* as such executors *or* trustees] beyond their costs of this cause; if there has been any former taxation, or any charges, &c., have been allowed in the accounts, add, and not already taxed and allowed.

\* 2299 (l.) \* *Same to be raised by the trustees.*

And let the said costs, and costs and charges, and expenses, when so taxed, be raised and paid by the said defendants, the trustees, by sale of sufficient part of the, &c., standing in the names, &c. 2 Seton, Dec. 767.

(m.) *Inquiry as to costs, charges, and expenses.*

And it is ordered that the Taxing Master do inquire whether the plaintiff [*or*, defendant] A. has properly incurred any and what costs, charges, and expenses relating to the administration, &c., beyond the costs of this cause (suit); and if so, let him tax and include the same in the costs of the said plaintiff [*or*, defendant] hereinbefore directed to be taxed.

(n.) *Decree for costs in a suit by trustee to obtain instructions; as between solicitor and client; charging it on different funds.*<sup>1</sup>

"It is further ordered, adjudged, and decreed, that all the costs in this suit, including counsel fees, shall be paid out of the property in controversy in the cause, and as the different parties having different interests therein have waived all right of appeal from this decree, and have seen and examined the charges for counsel fees and services made and presented by the respective counsel, and made no objection thereto, and have agreed as to the mode of apportioning the costs and charges upon the property in controversy, it is further ordered, by the consent of the parties, there be paid to S. E. S., Esquire, as solicitor and counsel for the plaintiff, for costs and counsel fees, nine hundred sixty dollars twenty-two cents; to C. C., Esquire, as solicitor and counsel for W. C. J., for costs and counsel fees, one thousand and seventy-nine dollars thirty-two cents; to R. S. S., Esquire, as guardian *ad litem* of J. Q. A. J., for costs, counsel fees, and services for other defendants, nine hundred and twenty-nine dollars thirty-two cents; to F. E. P., Esquire, as guardian *ad litem* and counsel for M. A. J. and L. C. J., for costs and counsel fees, three hundred and four dollars thirty-two cents; to R. H. D.,

<sup>1</sup> See 2 Seton Dec. (Eng. 1862) 162, 163, 164.



Junior, Esquire, as counsel for M. C. A., for costs and counsel fees, two hundred and eleven dollars and eighty-two cents; to C. W. T., Esquire, as solicitor for M. C. A., one hundred dollars; amounting in the whole to the sum of three thousand five hundred and eighty-five dollars; and that the said plaintiff, when he pays the said costs, shall pay out of the following funds their respective shares of said costs, as follows, to wit, from the capital of the trust funds held by him under the eighth clause of said will, seventeen hundred and twenty-three dollars ninety cents; from the interest of the \* same, two hundred and forty- \* 2300 eight dollars twenty-five cents; from the interest of said twenty thousand dollars bequeathed by the tenth clause of said will, one thousand and one dollars sixty-five cents; from the proceeds of real estate, being stocks in Massachusetts, held by plaintiff as trustee under the thirteenth clause of said will, four hundred nineteen dollars seventy cents; from the income of the same sixty dollars, forty-six cents; from the annuity payable to said M. C. A., one hundred and thirty-one dollars five cents. *Adams v. Johnson*, C. C. U. S. Mass., Oct. 7, 1861. In Equity.

By the Court.

— — —, *Clerk.*

*Appointing new trustees.*

(o.) *Decrees to appoint new trustees.*

The defendant B., by his answer [*or*, counsel], declining to act in the trusts of the testator's will [*or*, vested in him by the articles of settlement, *or* indenture], dated the — day of — in the pleadings mentioned, and desiring to be discharged therefrom (this Court doth hereby) appoint D. and E. [*or*, let two or more proper persons be appointed] trustees of the said will [*or*, articles, &c.] in his place [jointly with C., the continuing trustee]; and let the defendant B. [and C.] convey [assign and transfer] the trust estate [funds, property, and securities] vested in him [*or*, them] by the said will [*or*, articles, &c.], and the £ — standing in the name of, &c., in the books of the Bank of —, as in the pleadings mentioned or the residue thereof after payment of the costs, hereinafter mentioned, so as to vest the same in the said D. and E. [*or*, the trustees so to be appointed, *if so*, jointly with the said C.], upon the trusts mentioned in [*or*, declared by] the said will [*or*, articles, &c.], or such of them as are now subsisting or capable of taking effect [*or*, subject to the trusts mentioned in the said will dated, &c., *or*, articles, &c.], concerning the same, &c. [*If stock, add*, and they are to declare the trusts thereof accordingly]; and let such conveyance [*or* assignment, *or* declaration] be settled by the Judge [*or* Court, *or* Master]. [*If no infants or married women*, in case the parties differ; *If deeds in defendants' hands*, and let the defendant B. deliver to such new (and continuing) trustees upon oath, all deeds and writings in his custody or power, relating to the said trust estates, &c.; *If trustee to have his costs*, tax the defendant B. his costs of this cause (suit), as between solicitor and client; and let defendant

B. [and the said C.] be at liberty to raise and retain the same out of the said trust estate, *or*, funds, &c.] Liberty to apply. 2 Seton Dec. (Eng. ed. 1862) 778.

\* 2301 \* (p.) *Decree declaring construction of will ; parties entitled under costs, &c.*

Supreme Judicial Court.

BRISTOL, SS.

W. V., in Equity, *v.* J. B. and others.

At Chambers in Boston, March 8, 1869.

This cause came on to be heard at Boston on the fourteenth day of January, A. D. 1869, by adjournment from the October term of this Court at Taunton, within and for our county of Bristol, in the year 1868, upon bill and answers, and was argued by counsel, and thereupon, after due consideration, this Court is of opinion, and doth declare that the provisions in the eighth article of the will of said W. V. have reference only to the bequests to the descendants of the testator's sister A. W.; and as the contingency on which the bequest of the residue to the descendants of said A. W. depended did not happen, the questions presented in this suit are not affected by that article; that by the third clause of the fourth article of the will, on the death of the testator's grandson, W. V., Jr., one-half of the whole fund in the hands of the trustees vested in the children of the grandson, of whom the plaintiff is one; that on the death of C. E. V., one of the children of said grandson, the share of said C. E. V. went to his administrator, to be disposed of according to the Statute of Distributions, and that the plaintiff is not entitled by this suit to recover of the trustees any portion of the estate of said C. E. V.; that after the death of the testator's grandson, the father of the plaintiff, the residuary fund ought to be divided into two equal parts, one-half part to be kept and managed by the trustees, for the benefit of the testator's granddaughter J. V. F., so far as the will allows, that is to an annual amount not exceeding one-eighth of the income of that half, and the rest of such income to be invested with the principal, for the ultimate benefit of her issue, if they should become entitled to it; that the other half ought to be divided into five equal parts, one of which said fifth parts to be for each of the children of the testator's grandson, the father of the plaintiff, vesting in said children, in severalty, but to be retained and managed by the trustees until said children respectively come of age, or die, and subject under the will to different disbursements of income, according to the discretion of the trustees for their support during their minority; that by the construction of the last two clauses of the fifth article of the will, the plaintiff, upon arriving at the age of twenty-one years, is entitled to receive from the trustees a conveyance of one-fifth of one-half of the residuary estate remaining in their hands, upon an account to be settled in the Probate Court, after first deducting the costs and expenses of all parties to this suit.

It is therefore ordered, adjudged, and decreed, that the trustees J. B. and P. D. B. do pay out of the residuary trust fund in their hands

\* to the several parties to this suit, their costs and expenses of \*2302 this suit, as agreed upon by all parties, as follows; to wit, to B. F. T., of counsel for the plaintiff, W. V., the sum of twenty-five hundred and seventy-five dollars; to R. O., solicitor for the plaintiff, the sum of five hundred dollars; to E. C. A., solicitor and counsel for the trustees J. B. and P. D. B., the sum of one thousand and eighteen dollars; to P. H. S., solicitor and of counsel for J. V. F., J. A. F., J. V. T., C. B. T. and J. McL., guardian of H. A. F. and J. E. F., the sum of eleven hundred and fifty dollars; to J. C. B., solicitor and counsel for Jeff. B. V., Jessie B. V. and E. E. V., the sum to be allowed by the Probate Court in his guardian's account; and to W. W. C., solicitor and of counsel for M. A. R. and W. S. R., the sum of five hundred dollars; and that the trustees pay the fees of the clerk of Court taxed at \$120.20; and that upon their account being rendered to, and allowed by, the Probate Court for the county of Bristol (in case the parties do not otherwise agree upon the matter) the trustees J. B. and P. D. B. do, and they hereby are required and directed to, pay and convey to the plaintiff W. V. one-fifth of one-half of the said residuary trust fund and estate remaining in their hands, after deducting said costs and expenses of suit and such reasonable allowances as may be made to the said trustees in said account; and said trustees are required forthwith to make return or report of the manner in which they shall have executed this order and decree to this Court for approbation and confirmation of their doings thereon, and the cause is to stand continued until the coming in of such their return or report.

E. R. H., J. S. J. C.

#### 4. SOLICITORS.

##### (a.) *Order nisi to strike solicitor off the roll for misconduct.*

And upon the matters appearing to this Court in the evidence in this cause, It is ordered, that T., one of the solicitors of this Court, be struck off the roll of solicitors of this Court, unless he shall on the — day of — show unto this Court good cause to the contrary.

##### (b.) *Order absolute ; cause not shown or disallowed.*

Whereas by an order, &c. [*Recite order nisi, and order to substitute service on defendant's solicitor*]. Now upon motion, &c., of counsel for the plaintiffs who alleged that the said defendant T. hath been duly served with the said order, dated, &c., as by affidavit of — filed, &c., appears, and upon reading the said order and affidavit, and no cause having been shown this day to the contrary, this Court doth order that the name of the said defendant T. be struck off the roll of the solicitors of this Court. 2 Seton Dec. (Eng. ed. 1862) 865, 866.

## SUMMARY AND ANCILLARY RELIEF.

## SECTION I.

## INJUNCTIONS.

## I. FORM OF ORDER.

*(a.) Injunction on notice, or ex parte, on undertaking as to damage.*

UPON motion, &c., by counsel for the plaintiff, and upon hearing counsel for the defendant [*or, reading and affidavit of notice of his motion to the defendant, or if moved ex parte before the defendant has appeared to the bill, the clerk's certificate of the filing of the plaintiff's bill in this cause on the — day of —*]. [*Enter affidavit in support and in opposition, if any; and if ex parte, add, and the plaintiff by his counsel, undertaking to abide by any order this Court may make as to damages, in case this Court should hereafter be of opinion that the defendant shall have sustained any, by reason of this order, which the plaintiff ought to pay, If so, and also undertaking to accept short notice of motion to dissolve the injunction hereby awarded*], This Court doth order, that an injunction be awarded to restrain the defendant A., his servants, workmen, and agents, from, &c.; until the hearing of this cause, or until the further order of this Court.

*(b.) Ex parte interim order.*

Usual undertaking as to damage [Form above]. Let the defendant, his servants, workmen, and agents be restrained from, &c.; until after the — day of —, or until the further order of this Court [*If so, and let the plaintiff be at liberty to serve the defendant with a notice of motion for the — day of —, for an injunction in this cause.*]

*(c.) Ex parte injunction.*

Upon the application of the plaintiffs, and upon reading an affidavit of, &c. [*Enter evidence*]; and the plaintiffs, by their solicitors, having undertaken, &c. [Form above], and having signed, &c., to that effect, accordingly this Court doth order that an injunction be awarded, &c.  
2 Seton Dec. (Eng. ed. 1862) 867.

\* (d.) *Another form, provisional.* (Mass.) \* 2304

At Chambers, Boston, May 14, 1862.

Let an injunction issue in conformity with the prayer of the bill, to continue until the further order of the Court or some justice thereof.

E. R. H.,

J. S. J. C.

(e.) *Inquiry as to damages, to be paid according to undertaking.*

Upon motion for a decree, &c. — “This Court doth declare, that the plaintiff is not entitled to any relief claimed by his said bill against the defendants, or any of them; and upon the plaintiff’s undertaking contained in the order, dated, &c., to pay any sum which this Court might direct by way of damages to the said defendants, by reason of the sale of the book in the said bill mentioned, called, &c., having been stopped, pursuant to the undertaking given, by the said defendants to that effect, on the — day of —, it is ordered that it be referred to, &c., to inquire and report what damages have been sustained by the defendants by reason of the sale of the said book having been so stopped; and that the plaintiff N., within one month from the date of the Master’s report, to be made pursuant to this order, pay the amount which shall be thereby found due (for damages in respect of the matters aforesaid) to the defendants R. and W., &c.” — And thereupon recognizance entered into to answer damages to be vacated; and all further proceedings to be stayed. Plaintiff to pay defendants’ costs of suit and of motion for injunction.<sup>1</sup> *Napier v. Routledge* (1859), 2 Seton Dec. (Eng. ed. 1862) 868.

## 2. STAYING PROCEEDINGS IN OTHER COURTS.

(a.) *Staying present and future action.*

This Court doth order that an injunction be awarded to restrain the defendant T., his attorneys and agents, from further prosecuting the action commenced (by the defendant) against the plaintiff (in the — Court, &c.), as in the bill mentioned, to recover the amount of principal, interest, and costs secured by the indenture dated, &c., in the plaintiff’s bill mentioned; and from commencing (or prosecuting) any other action at Law (or taking any other proceeding) against the plaintiff for the recovery of such principal, interest and costs, or any part thereof, until the hearing of this cause, or until the further order of this Court. 2 Seton Dec. (Eng. ed. 1862) 874, 875.

<sup>1</sup> In *Merryfield v. Jones*, 2 Curtis, 306, it was decided that a Court of Equity cannot order the plaintiff and his sureties on an injunction bond, to pay the damages sustained by reason of the injunction. The defendant must resort to an action on the bond.

\* 2305      \* (b.) *Substance of final decree, injunction perpetual.*

"That the injunction heretofore issued in this cause be made perpetual, and that the said defendant H. be, and he hereby is, perpetually enjoined from prosecuting the suit at Law now pending for the recovery of the said plaintiff's law library, or any other action at Law for the same cause; and that said H. is directed to discontinue the suit now pending, as aforesaid, provided that neither party shall be entitled to recover costs in said suit at Law against the other. And said defendant is further ordered and decreed to deliver the said law library of the plaintiff to him, free of any charge or incumbrance created by him thereupon. And it is further decreed that in this cause neither party shall have or recover any costs of the other."<sup>1</sup>

(c.) *Leave to proceed with action, but execution stayed.*

It is ordered, that the defendant be at liberty to proceed with the action at Law commenced by him against the plaintiff (in—— Court, &c.), respecting the matters in the plaintiff's bill mentioned; and in case the defendant shall obtain judgment in the said action, he is not to sue out execution thereon, or take any other proceedings thereunder, until the further order of this Court. Liberty to apply. Costs of application to be costs in cause. 2 Seton Dec. (Eng. ed. 1862) 875.

(d.) *To stay sale and withdraw, where execution issued after notice of decree.*

It is ordered that, &c., to restrain H. from selling or disposing of any part of the property and effects of and belonging to, or forming part of, the estate of V., the intestate, taken in execution by the sheriff of M., under and by virtue of the writ of *fi. fa.*, sued out in the action in the Court of, &c., wherein the said H. is plaintiff, and the defendant V., as administratrix of the said estate, is defendant, and from taking any further proceedings in the said action, or under the said execution; and it is ordered that the said H. withdraw from the possession of the property and effects of the said intestate so taken in execution, as aforesaid. 2 Seton Dec. (Eng. ed. 1862) 883.

## 3. WASTE, TRESPASS, AND NUISANCE.

(a.) *Injunction to stay felling ornamental timber and other waste.*

This Court doth order that an injunction be awarded to restrain the defendant D., her agents, servants, and workmen, from cutting  
\* 2306      down \* any timber or other trees growing on the estate in the plaintiff's bill mentioned, which are planted or growing thereon for the protection or shelter of the several mansion-houses belonging to the said estate, or for the ornament of the said houses, or which grow in

<sup>1</sup> Ross v. Harper, 99 Mass. 175.

lines, walks, vistas, or otherwise, for the ornament of the said houses, or of the gardens or parks or pleasure grounds thereunto belonging; and it is further ordered, that the injunction do also extend to restrain the defendant D., her servants, workmen, and agents, from cutting down any timber or other trees, except at seasonable times, and in a husband-like manner; and likewise from cutting down saplings and young trees, not fit to be cut as and for the purposes of timber; until, &c. *Chamberlayne v. Dummer*, 1 B. C. C. 166; 2 Seton Dec. (Eng. ed. 1862) 891.

(b.) *The like; and trees to intercept view; and other waste.*

“Or which were planted for the purpose of intercepting the view of objects intended to be kept out of sight.” — “And also from committing any other spoil or destruction on the said estate.”

(c.) *The like; and trees to shade or shelter.*

“Standing or growing for ornament, shade, or shelter of the mansion and buildings at, &c., or any other houses or buildings on the settled estates.”

(d.) *Injunction and inquiry as to timber cut by life-tenant, sans waste, except, &c.*

Bill by remainder-man against assignee of life estate, without impeachment of, or for any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses and buildings to go to decay, and not repairing the same.

This Court doth declare, that according to the true construction of the indenture dated, &c., in, &c., the defendant S., as assignee of the life-estate of V., is entitled to cut all such timber and wood growing on the estates in question, not being trees or wood planted or left standing or growing there for the protection or shelter of the mansion-house, called, &c., in the bill mentioned, or for the ornament of the said house, or which grow in lines, walks, or otherwise for the ornament of the said house, or of the gardens, or park, or pleasure grounds thereunto belonging, or as owner in fee-simple, having regard to his present interest, and also to the permanent advantage of the estate, might cut in a due course of management; and the defendant S., by his counsel, undertaking after the present month to give to the plaintiff notice, a fortnight previously to his cutting trees or wood, specifying the trees or wood which he intends to cut.” — Injunction to stay defendant S., his servants, &c., “from cutting any trees or wood growing upon the \* said estates or any part thereof, being trees or wood planted, \* 2307 &c., [see above] thereunto belonging, or being such trees or wood as an owner in fee-simple, having regard to his present interest and also to the permanent advantage of the estate, would not cut in due course of management.” — But nothing in this decree contained is to prevent the said defendant S. from cutting any underwood on the said

estates which shall have become fit to cut, according to the custom of the country; And it is ordered, that it be referred to, &c., to inquire and report, whether any and what timber or wood (other than such timber or wood as the said defendant S. was entitled to cut according to the description aforesaid), has been cut by the said defendant S., upon the said estates; 2. And if so, then that said Master do take an account of such timber or wood so cut, and of the proceeds and value thereof. Adjourn, &c. *Vincent v. Spicer*, 22 Beav. 380; 4 W. R. 667; 2 Seton Dec. (Eng. ed. 1862) 893.

(e.) *Staying waste by tenants in common.*

This Court doth order, that an injunction be awarded against the defendant A., to restrain him, his servants, workmen, and agents, from cutting down any timber, or other trees, or underwood, from off the estates in the bill mentioned at unseasonable times; until, &c. 2 Seton Dec. (Eng. ed. 1862) 894.

(f.) *Staying pollution of a stream; nuisance.*<sup>1</sup>

This Court doth order, that a perpetual injunction be awarded to restrain the Local Board of Health for the town of —, their agents, servants, and workmen, from causing or permitting to pass any sewage, filth, or other offensive matter, either solid or liquid, down or through any sewer or drain into the river W., in the bill mentioned, to the injury of the plaintiff. 2 Seton Dec. (Eng. ed. 1862) 894.

(g.) *Another form.*

This Court doth order that a perpetual injunction be awarded against the defendants, the Stowmarket Company, to restrain the said defendants, their servants, agents, and workmen, from discharging from their works in the plaintiff's bill mentioned, into the river or stream in the said bill also mentioned, so as to cause it to flow to the plaintiff's land, messuage, and mills, therein also mentioned, in a state less pure than that in which it flowed there previously to the establishment of the said works, to the injury of the plaintiff, any such refuse or other  
 \* 2308 matter \* as was discharged by the defendants from the same works into the said river or stream previously to the filing of the said bill, or any noxious fluids or other foul matters whatsoever. *Lingwood v. Stowmarket Company*, L. R. 1 Eq. 77, 336.

(h.) *Decree establishing right to oyster fishing and quieting in possession, with perpetual injunction.*

Upon motion, proof of title, and affidavit of service on the defendants — This Court doth “declare, that the plaintiff and his assigns, and

<sup>1</sup> For other forms of injunction to stay nuisances, see *Walter v. Selfe*, 4 D. & S. 325; *Beav.* 254, note; *Crump v. Lambert*, L. R. *Pollock v. Hester*, 11 Hare, 275; *Bostock v.* 3 Eq. 409.  
*North Staffordshire Ry. Co.* 5 D. & S. 590;



every other person or persons claiming or to claim under or by virtue of the will of, &c., is and are entitled to the exclusive right to use the piece or parcel of ground (land), part of the soil or bed of the Straits of Menai, lying and being, between, &c., and the water or waters covering the same, as beds or a bed for oysters or oyster spat, and to put down and replace, and to dredge, take, and carry away, oyster spat and oysters therefrom; and decree that the plaintiff be quieted in the exclusive possession of the oyster fishery or oyster fisheries situate, lying, and being upon or within the said piece or parcel of ground (land), or the water or waters covering the same; and the Court doth order that a perpetual injunction be awarded to restrain the defendants J. K., &c., and each and every of their agents, servants, and workmen, from using the said piece or parcel of ground (land), water or waters, and every part thereof, as beds or a bed for oyster spat or oysters, and from putting down or dredging, taking and carrying away any oyster spat and oysters thereupon or therefrom, and from moving or in any manner disturbing the oyster spat or oysters now, or at any time, lying, and being upon or within the said piece of ground (land), water or waters, and from interfering with or in any way hindering the enjoyment, use, or occupation by the plaintiff and his assigns, and every other the person or persons claiming or to claim under or by virtue of the said will of the said, &c., of the said piece or parcel of ground (land), and the water or waters covering the same, as an oyster bed or oyster fishery,"<sup>1</sup> *Bulkley v. Jones* (1856), 2 Seton Dec. (Eng. ed. 1862) 895, 896.

(i.) *Staying, diverting, or restraining a flow of water.*

Order of the 29th of June, 1859, to be discharged, and injunction dissolved, and instead: "The Court doth order that an injunction be awarded to restrain the defendant from diverting the water in the ponds or springs situated between the south embankment of the reservoir and the boundary wall in the pleadings mentioned, so as to prevent the same from flowing into the river P.; and from employing any steam-engines, \* pumps, or any other means of using the water \* 2309 in the said ponds or springs, so as to diminish the quantity of the said water which flows into the said river; and also to restrain the defendant from diverting the course of the water which flows from surface springs on the south side of the wall which extends from east to west on S. Hill, so as to prevent the same from flowing in its natural course towards and into the said river." Plaintiff and defendant agreeing that the legal right as to the matters in question be decided by, &c. And the Court doth declare, "that the plaintiff is not entitled to the use of the water in the pond called P.'s Pond." *Ennor v. Barwell*, (1860.) Leave was afterwards given to bring an action. S. C., 1 D. F. J., 530; 2 Seton Dec. (Eng. ed. 1862) 901.<sup>1</sup>

<sup>1</sup> See form of order declaring an exclusive right of navigation, and enjoining an infringement of it, in *Ogden v. Gibbons*, 4 John. Ch. 174, 182, 183.

<sup>1</sup> See *other forms* in *Thomas v. Jones*, 1

Y. & C. C. 526; *Cuddon v. Morley*, 7 Hare, 207; *Powell v. Aiken*, 4 K. & J. 359, and note; *Beaufort v. Morris*, 6 Hare, 346, 348; *Dugdale v. Robertson*, 3 K. & J. 701, and note.

(j.) *Decree for abating and reducing a mill-dam which caused the water to flow back on mills above ; but so framed as to conclude neither party as to the right to raise flash-boards in the dam in certain states of the river. Injunction not again to raise dam so reduced.*

*Final decree.*] This cause came on again to be heard upon the Master's report, and the exceptions taken thereto by the parties respectively, and was argued by counsel. On consideration whereof, it was ordered, adjudged, and decreed by the Court, that the exceptions of the said parties respectively be, and the same are, hereby overruled, and that the said report do stand in all matters confirmed except as hereinafter stated. And it not appearing by the answers of the defendants that they assert any right or title to the Eel Dam, in the said answers stated, under the owners thereof, by operation of law or otherwise, nor what the true nature and extent of the right and title of the said owners of said Eel Dam were and are ; It is, thereupon, further ordered, adjudged, and decreed, that the said Albion Dam in the said pleadings mentioned ought to be reduced from its height, at the time of the filing of the plaintiffs' bill, the space of twenty-four inches from the top thereof, as a nuisance to the privileges and mills of the plaintiffs in the same bill mentioned, and in violation of their rights thereto ; and the said defendants are hereby ordered to abate and reduce the said Albion Dam the said twenty-four inches accordingly, within forty days from the entering of this decree. And it is further ordered, adjudged, and decreed, that the said defendants, their heirs and assigns, be, and they hereby are, perpetually enjoined, after the same Albion Dam is so abated and reduced as aforesaid, never thereafter to raise the same dam above the level to which the same shall be so abated and reduced as aforesaid. And it is further adjudged and decreed, that a writ \* 2310 of injunction \* do issue forthwith against the defendants, commanding them to comply with all and singular the premises so enjoined upon them.

And inasmuch as it appears from the Master's report that in low states of the river, when it is not obstructed by snow and ice, the defendants might, without injury to the plaintiffs, put flash-boards on their dam sixteen inches and one-half wide, and the same keep up until the water in the river flows over the top of them with their present mill gates drawn, and it is not the intent of the Court, in any manner, to act upon this part of the said report, but to leave the parties respectively to their respective rights in regard thereof in the same manner as if the same were not stated in the same report ; it is further ordered and declared, that no part of this decree is to be construed in any manner to affirm or deny the right of the defendants to put up such flash-boards ; but the parties are left to their respective rights in the premises, as if the same were not stated in the report.

And it is further ordered and decreed, that the plaintiffs do recover their costs in the premises. *Mann v. Wilkinson*, 2 Sumner, 276, 277.

(k.) *Interlocutory decree, ordering reference for inquiry.*

And now this cause coming on to be heard, &c., &c., it is ordered by the Court that it be referred to T. R., Esq., as Master with directions to ascertain and report to this Court upon the evidence in the cause, and such other evidence as he may deem necessary, and such experiments as he may choose to direct, to what extent, if any, the erection of the Albion Dam has obstructed or does obstruct the natural flow of the water from the plaintiff's mill and lands, and to what extent it will be required to be lowered, if any, in order to restore the flow of said water to its state before said erection; and that he have authority to summon witnesses, administer oaths, and exercise all the usual powers of Master in Chancery in such cases, and that he have authority in particular to direct the parties to stop their several mills if necessary, in order that all such experiments as the Master may think requisite to be made may be made, and for the same purpose, if necessary, to direct that the dam may be lowered and ponds drawn off, and to compel the obedience of the said parties to all orders made by him in the necessary discharge of the duties of his appointment. And that he may report to this Court of his doings in the premises, when he shall have performed the duties of his said appointment.

And the said Master is in the mean time specially directed to proceed immediately to ascertain by actual experiments, conducted by skilful engineers, to be chosen by himself and with notice to the parties, the effect on the plaintiff's works of lowering the Albion Dam to the height at which it stood before the erection thereon of 1828, that is to say, two feet below its present height, that these experiments be made \* at different states of the river, so as to show the effect \* 2311 aforesaid at those several states respectively, that the Master have authority to direct the defendants to draw off the water in their pond, by gates or by reducing the height of the dam or by any other means so that the said experiments may be fully and satisfactorily made, at the said several depths of water in the river. That the said Master cause these experiments to be made forthwith, and that he report the result thereof specially to this Court. And that the Master have also authority by such experiments to ascertain the effect of lowering said dam to intermediate stages less than two feet, at the said several states of the water; and that he have authority to direct and order both parties to stop their respective works if necessary, and to do and perform whatever he may judge necessary, in order to render such experiments complete and satisfactory.

Nov. Term, 1833.

Ordered as above.

B. C., *Clerk.*

The parties agree that S. B. C. and R. S. S. be the engineers to be employed by the Master.

Witness, B. C., *Clerk.*

(1.) *Another decree in like case.*

W. &amp; D. D. F. v. Blackstone Canal Co.

This cause came on at the last term of this Court to be heard upon the bill and answer, and other proceedings and evidence in the case, and was argued by counsel.

On consideration whereof it is adjudged and declared by the Court, that the plaintiffs have sufficiently established in evidence the grievance complained of in their bill; that the defendants have not established any right to raise Woonsocket Dam and flow back the water of the Blackstone River upon the plaintiffs' mills in the manner set forth in the plaintiffs' bill under the acts of incorporation of the State of Massachusetts or of the State of Rhode Island, or any of them set forth in the defendants' answer, or under the agreement set forth in the same answer, and that the raising of the said dam as aforesaid, so far as it has injured the plaintiffs in the manner set forth in the bill, is a nuisance to the plaintiffs, and ought to be abated, and that a perpetual injunction ought to issue to the defendants, prohibiting them from hereafter keeping of, continuing, or after abatement from again raising the said dam to any height which shall be a nuisance to the plaintiffs as aforesaid. And it is decreed by the Court accordingly; but inasmuch as it does

not appear to the Court what lowering of the said Woonsocket  
 \* 2312 Dam, not exceeding two feet, will abate and remove the \* nuisance to the plaintiffs as aforesaid; it is therefore further ordered, adjudged, and decreed, that it be referred to a Master to be named by the Court, to inquire into and to report at a future time to the Court how much the said dam ought to be lowered, not exceeding two feet, as aforesaid, in order to remove and abate the nuisance to the plaintiffs as aforesaid, and the said Master is hereby authorized, at the expense of the parties or either of them, as shall be hereafter directed by the Court, in addition to an examination of all the papers and evidence in the cause, which are hereby referred to him to make and cause to be made further examinations by witnesses under oath, and by real surveys and other proceedings to be had by him in the premises, as he shall deem meet and proper to accomplish the purposes hereinbefore stated.

And the said Master shall cause due notice to be given to the parties of all meetings to be had and held by him, for the purposes aforesaid, at which meetings the parties shall be at liberty to attend and examine and prove all proper matters, with the assistance of counsel; and the Master shall, as soon as he shall have completed his proceedings, make due report thereof to the Court, and that in the mean time all future proceedings and decrees be reserved for the consideration of the Court.

JOSEPH STORY.

In this case the decree is entered as on file, and thereupon by agreement of parties, it is further ordered, that all and every further and

other proceedings in said bill and decree be for ever stayed, each party to pay the costs of their own depositions, surveys, and witnesses.

The Clerk's and Marshal's fees to be equally paid by the parties. *Farnum v. Blackstone Canal Corp.*, 1 Sumner, 46.

#### 4. DECREE TO RESTRAIN THE USE OF REAL ESTATE IN VIOLATION OF AN AGREEMENT RESPECTING ITS OCCUPATION.<sup>1</sup>

And now this cause having been fully heard, it is ordered and decreed that the demurrer be overruled. Thereupon the said defendants, by the agreement of their counsel on file in the cause, do consent that the plaintiffs' bill be taken as confessed by them, and all the facts therein stated as fully proved and established on the part of said plaintiff; and that thereupon this Court shall render such final decree in favor of the plaintiffs as by the law of this Commonwealth and the facts so established they are properly entitled to have, and according to the prayer of their bill, with taxable costs in favor of said plaintiffs.

\*The Court doth thereupon decree, that the said defendants, \* 2313 and each of them, their agents, assistants, and abettors, be for ever hereafter perpetually enjoined, and they are hereby enjoined, to desist and refrain from all use of the premises numbered two on Hayward Place aforesaid, or any portion of the same; and from appropriating or applying the same to the purpose of a restaurant, eating-house, saloon, or any similar use, by whatever name called or known, and from all use or application of said lot, or the buildings thereon, or any portion of the same, for any purpose whatever, except that of a "dwelling-house only," and that in the ordinary common acceptance of that term.

And it is further decreed that the plaintiffs recover of the defendants their legal, taxable costs in the premises.

And it is further ordered that the Clerk of this Court do issue a proper writ of injunction, for the carrying the other portions of this decree into effect, on application of the plaintiffs, at any time after the first day of May next. *Parker v. Nightingale*, 6 Allen, 341.

By the Court.

Boston, Feb. 8th, 1864.

G. C. W., Clerk.

#### 5. COPYRIGHT.

##### (a.) *Staying publishing newspaper.*

This Court doth order that an injunction be awarded to restrain the defendants B. and H., their servants, workmen, and agents, from printing and publishing, composing, and offering to sale, the newspaper in the pleadings mentioned, called "The Real John Bull," or "The Old Real John Bull," and from printing, or publishing, or exposing, or offering for sale any newspapers or newspaper as and for a continuation of the plaintiff's said newspaper called "The Real John Bull," until, &c. *Edmonds v. Benhow*, 2 Seton Dec. (Eng. ed. 1862) 905.

<sup>1</sup> See *Senior v. Pawson*, L. R. 3 Eq. 330.

*(b.) Staying partial infringement.*

This Court doth order that an injunction be awarded to restrain the defendant, his servants, agents, or workmen, from printing, publishing, selling, or otherwise disposing of, such parts of the book in the bill mentioned to have been published by the defendant as hereinafter specified, viz., that part of said book of the defendant which is entitled, &c., and also that part thereof which is entitled, &c.; until, &c. 2 Seton Dec. (Eng. ed. 1862) 905.

*(c.) Perpetual injunction upon printing, publishing, &c.*

"This cause came on to be heard, at this term, upon the bill and answer, and the Master's report, and was argued by counsel, on \* 2314 consideration \* whereof, it is ordered, adjudged, and decreed that the Master's report be, and the same hereby is, approved and confirmed; And thereupon it is further ordered, adjudged, and decreed by the Court, that said defendants be, and they hereby are, severally and perpetually restrained and enjoined from printing, publishing, selling, or exposing to sale, or causing or being in any way concerned in the printing, publishing, selling, or exposing to sale, of any copy or copies of the whole or any part of the three hundred and fifty-three pages copied, as reported by the Master in said Life of Washington, mentioned in the bill and answer, published by the defendants, from the Life and Writings of Washington, mentioned in the bill and answer published by the plaintiffs; and that the plaintiffs recover their costs against the defendants; the plaintiffs waiving the account prayed for in the bill, the Court does not order such account." *Folsom v. Marsh*, 2 Story, C. C. 100.

*(d.) Inquiry as to infringement.*

*(By consent.)* It is ordered that it be referred to, &c., to inquire and report, whether the copperplate published by the defendant, entitled, &c., is of the same size and scale, and has the same marginal notes and directions or instructions, and is in all respects the same as the first plate published by the plaintiff, entitled, &c., save an affected variation in the historical and geographical anecdotes in the margin, &c.<sup>1</sup> 2 Seton Dec. (Eng. ed. 1862) 905.

## 6. PATENTS.

*(a.) Staying infringing patent as to bricks.*

The Court doth order that an injunction be awarded to restrain the defendant H., his agents, servants, and workmen, from making or vending any perforated bricks upon the principle of the inventions in

<sup>1</sup> For *other forms* in like cases, see *Clement v. Maddick*, 1 Gif. 101; *Pope v. Curl*, 2 Atk. 342; *Reade v. Lacy*, 1 J. & H. 524, and note;

*Mayhew v. Maxwell*, id. 312; *Jarrold v. Houls-ton*, 3 K. & J. 722; *Delfe v. Delamotte*, id. 584; 2 Seton Dec. (Eng. ed. 1862) 905, 906.

the plaintiffs' bill mentioned, belonging to the plaintiffs or either of them, during the remainder of the respective terms of the patents in the plaintiffs' bill mentioned, and from counterfeiting, imitating, or resembling the same inventions, or either of them, or making any addition thereto or subtraction therefrom; until, &c. *Beart v. Hewitt* (1853), 2 Seton Dec. (Eng. ed. 1862) 909.

*\*(b.) Staying infringement as to machinery.*<sup>1</sup>

\* 2315

This Court doth order, that an injunction be awarded to restrain defendants W. &c., their servants, agents, and workmen, during the continuance of the letters-patent firstly and secondly in the plaintiff's bill stated and set forth, and whilst the same may be in force, from manufacturing, selling, using, offering or exposing for sale, or making any other profitable use or disposition of any wool-combing machines, or parts of wool-combing machines, made, constructed, contrived, or arranged so as to comb wool by machinery, apparatus, arrangements, operations, contrivances, means, or appliances, similar to the machinery, apparatus, contrivances, arrangements, means, or appliances, the subject of the plaintiff's inventions or either of them, or differing therefrom colorably, or by mere mechanical equivalents, and generally from counterfeiting, imitating, or resembling plaintiff's inventions, or either of them, or any part thereof, or making any addition thereto or subtraction therefrom, and parting with the custody of any wool-combing machines, or parts of machines, whether finished or in progress, now in their or either of their possession, which have been so made, constructed, contrived, or arranged; until, &c. *Lister v. Wood* (1858), 2 Seton Dec. (Eng. ed. 1862) 909.

*(c.) Motion to stand over, with leave to bring action and direction for inspection; defendant keeping an account.*

Defendants undertaking to keep an account of all mohair cloths, and other textile fabrics, finished by or for them, or any or either of them, in the manner in the plaintiff's bill complained of, it is ordered that this motion stand over, with liberty to the plaintiffs to bring such action at law, in, &c., against the defendants, as they may be advised; And it is ordered, that the defendants permit and suffer the plaintiffs, with such two viewers as the plaintiffs shall think proper, to go over all or any of the manufactories of the said defendants, or of any or either of them, and inspect the machinery set up there for finishing mohair cloth, or other textile fabrics, and to observe the method or methods of finishing such mohair cloth, or other textile fabrics, by the said defendants, or any or either of them, for which purpose the said defendants are to put their machinery to work in the presence of the said plaintiffs and

<sup>1</sup> For reference to other cases in which are forms of injunction to restrain infringements of patents, see 2 Seton Dec. (Eng. ed. 1862) 909, 910; *Caldwell v. Vanvliessen*, 9 Hare, 431; *Patent Type Co. v. Walter*, John. 732.

such viewers, and to afford every facility to them to ascertain the process of finishing cloth by means of such machinery and every part thereof, it being the object and intention of this Court to enable the plaintiffs to give such evidence to the Court and jury, on the trial of such action, as will enable them to make out, if the fact be so, the

\* 2316 \* infringement complained of by their said bill. Liberty to apply. *Beardsell v. Schwann* (1857), 2 Seton Dec. (Eng. ed. 1862) 910.

*(d.) Staying infringement, after verdict establishing patent.*

The Court doth order, that an injunction be awarded to restrain the defendants D. &c., their agents, servants, and workmen, during the continuance of the letters-patent in the plaintiffs' bill mentioned, and whilst the same may be in force, from using or employing, without the leave or license of the plaintiffs, in or for the purpose of the folding of the flaps of envelopes in succession one after the other, or for the gumming or cementing together the edges of such flaps and causing such edges to adhere together whilst in course of being folded, any machines similar to the machine which was produced for inspection at their factory on the — day of —, as in the plaintiffs' bill stated, or any machinery, mechanism, or mechanical contrivance made or arranged, according to the plaintiffs' said patent inventions, or differing therefrom only colorably or by the substitution of mere mechanical equivalents for the same, and from folding the flaps of envelopes in succession one after the other, and gumming or cementing the edges of such flaps and causing the same to adhere together whilst such flaps are in course of folding by means of any such machine, machinery, mechanism, or mechanical contrivances, and from selling or offering for sale any envelopes which have been heretofore manufactured by the said defendants, their agents, servants, or workmen, and in the manufacture whereof any such machine, machinery, or mechanical contrivances hath, or have, been used or employed for the purpose of folding the flaps of such envelopes in succession, or for gumming or cementing, or causing the same to adhere together whilst such flaps have been in course of being folded, and generally from making, using, exercising, putting in practice, or vending plaintiffs' patent inventions, or any or either of them, without their license or authority, and from or in any wise counterfeiting, imitating, or resembling the same; until, &c. *De la Rue v. Dickinson* (1857), 2 Seton Dec. (Eng. ed. 1862) 911.

*(e.) Declaration of validity of patent ; infringement ; account ; perpetual injunction.*

R. W., H. S., and D. B. W. v. H. B., H. B., Jr., and H. F.

This cause having been brought to a final hearing upon the pleadings and proofs, and counsel for the respective parties having been heard, and the same having been duly considered by the Court : It is found and



hereby ordered, adjudged, and decreed [declared] that the letters-patent, No. 12,649, granted unto the said R. W., April 3, 1855, is a good and valid patent, being the patent referred to in the plaintiffs'

\* bill, and that the said R. W. was the original and first inven- \* 2317  
tor of the improvement described and claimed in the said patent;  
and also, that the said defendants have infringed upon the said patent,  
and upon the exclusive rights of the plaintiffs under the same.

And it is further ordered, adjudged, and decreed, that the plaintiffs do recover of the defendants the profits, gains, and advantages which the said defendants, or any or either of them, have received or made, or which have arisen or accrued to them, or either of them, from said infringement of the said patents, by the manufacture, use, or sale of the improvements described and secured by the said letters-patent at any and at all times since the seventeenth day of November, 1856.

And it is further ordered, adjudged, and decreed, that the said plaintiffs do recover of the defendants their costs and charges and disbursements in this suit, to be taxed.

And it is further ordered, adjudged, and decreed, that it be referred to K. G. W., one of the Masters of this Court, residing in the city of N. Y., to ascertain, take, and state, and report to the Court, an account of the gains, profits, and advantages which the said defendants, or either of them, have received, or which have arisen or accrued to them, or either of them, from infringing the said exclusive rights of the said plaintiffs by the manufacture, use, and sale of the said improvements patented in said letters-patent, since the said seventeenth day of November, 1856.

And it is further ordered, adjudged, and decreed, that the plaintiffs, on such accounting, have the right to cause an examination of said defendants, and each of them, *ore tenus*, or otherwise, and also the production of their books, vouchers, and documents of each of them, and that the said defendants attend for such purpose before said Master, from time to time, as said Master shall direct.

And it is also further ordered, adjudged, and decreed, that a perpetual injunction be issued in this suit against the said defendants, according to the prayer of the bill.

K. G. W., *Clerk.*

## 7. TRADE-MARKS.

### (a.) *Staying using trade-marks as to tools or cutlery.*

This Court doth order that an injunction be awarded to restrain the defendants W. &c., respectively (and every and each of them), and the respective servants, agents, and workmen of the said defendants (and of every and each of them), from stamping, cutting, or engraving, or causing or permitting to be stamped, cut, or engraved, upon any tools or other articles manufactured for or bought, procured, or sold by \* them, the words, "Collins & Co., Hartford, Cast Steel, War- \* 2318  
ranted," or any other words similar to, or only colorably differing  
from such words, or any words or marks so contrived as to represent or

lead to the belief that the said tools or other articles were the manufacture of the said Collins & Co.; and from affixing or causing to be affixed to any tools or other articles manufactured for or bought, procured, or sold by them, or otherwise using or employing, or causing or permitting to be used or employed, any labels containing the words, &c. (*as above*), or any label or labels similar to or only colorably differing from the labels made or used by the said company, as in the plaintiff's bill mentioned, or so contrived and prepared as to represent or lead to the belief that the tools or other articles manufactured or sold by the defendants were the manufacture of the said company; and also from selling, exporting, consigning, or otherwise disposing of any tools or other articles having or bearing thereon any such words, marks, or labels as in the said bill mentioned, or any other words, marks, or labels only colorably differing from the said marks and labels of the said company; until, &c. *Collins v. Walker* (1857), 2 Seton Dec. (Eng. ed. 1862) 914.

(b.) *Perpetual injunction on the use of another's trade-marks.*

This cause came on to be heard at this term upon the bill, answer, and proofs in the cause, and was argued by counsel on behalf of the plaintiffs, no counsel appearing for the defendant [the counsel who had previously appeared for him having voluntarily withdrawn from the cause].

On consideration whereof, it is ordered, adjudged, and decreed by the Court, that a perpetual injunction be granted in the premises according to the prayer of the bill, and that the plaintiffs do recover costs against the defendant, to be taxed by the clerk under the direction of the Court. *Taylor v. Carpenter*, 3 Story, C. C. 458.

(c.) *Perpetual injunction against shipping goods with plaintiffs' trade-marks, on motion for decree.*

This Court doth order that "a perpetual injunction be awarded to restrain the defendants J. and N., and each of them, their servants and agents, from affixing or applying, or causing to be affixed or applied, to any goods manufactured, sold, shipped, or supplied by them, any mark, and especially the figure of a lion, &c., so contrived as by colorable imitation or otherwise to represent the goods manufactured, sold, shipped, or supplied by the plaintiffs as being standard Spanish Stripes, &c., or other woollen goods manufactured or shipped by or for the plaintiffs, and from selling, exporting, or shipping, or causing or allowing to be shipped or exported, or otherwise disposing of, any goods manufactured  
\* 2319 by or for the defendants, to which any such mark, \* has been or shall be affixed or applied. Defendants to pay plaintiffs' costs of suit to be taxed, &c. *Henderson v. Jones* (1861), 2 Seton Dec. (Eng. ed. 1862) 915.<sup>1</sup>

<sup>1</sup> For other cases in which are found forms of injunctions to restrain use of trade-marks, see *Edelsten v. Vick*, 11 Hare, 86; *Farina v. Silverlock*, 1 K. & J. 509; S. C. 6 De G. M. &

G. 214, note; *Gant v. Aleploglu*, 6 Beav. 69, n.; *Knott v. Morgan*, 2 Keen, 220; *Morison v. Moat*, 9 Hare, 241.

# 8. PARTNERSHIP.

## (a.) *Order for injunction against acting as partner.*<sup>2</sup>

The Court doth order that an injunction be awarded against the defendant B., his agents and servants, from entering into any contract or contracts, and from accepting, drawing, indorsing, or negotiating any bills or bill of exchange, notes or note, or written securities or security, in the name of the partnership firm of D. and B.; and from contracting any debts or debt, and buying and selling any goods, and from making or entering into any verbal or written promise, agreement, or undertaking, and from doing or causing to be done any acts or act, in the name or on the credit of the said partnership firm, or whereby the said partnership firm can, or may, in any manner become, or be made liable to, or for the payment of, any sums or sum of money, or for the performance of any contract, promise, or undertaking: until, &c. 2 Seton Dec. (Eng. ed. 1862) 917.

## (b.) *Injunction on dissolution of partnership.*

This Court doth order that an injunction be awarded to restrain the defendant and his (servants and) agents from intermeddling with the partnership assets, and from signing or using the name or style of the firm of H. and D., or from trading, or dealing, in or under that name or style, until, &c. Directions for receiver. 2 Seton Dec. (Eng. ed. 1862) 917.

# 9. NEGOTIATING SECURITIES.

This Court doth order that an injunction be awarded to restrain the defendants from parting with, out of the custody of them, or any of them, or indorsing, assigning, or negotiating the promissory note, dated &c., in the plaintiff's bill (and affidavit) mentioned; until, &c.

## \* 10. TRANSFERS.

\* 2320

The Court doth order that an injunction be awarded to restrain the defendant A. from transferring any stock standing in the name of B., the testator in, &c., named, or in the name of the said A., as the executor of the said B., or any part thereof, and from receiving the dividends and interest due or to accrue due thereon; and also to restrain the President, Directors, & Co., of the — bank, from permitting the said defendant A. to transfer such stock, or receive such dividends and

<sup>2</sup> Refusing to account, excluding a co-partner from an examination of the partnership books, and from a participation in the profits of the business, although breaches of duty do not, standing alone, call for the interposition of the Court by injunction before answer, or an opportunity of hearing. *Petit v. Chevelier*,

13 N. J. Eq. 181. An injunction restraining interference with the plaintiff in the exercise of his rights as a partner of the defendants will be dissolved on the clear averment in the answer, that the partnership was dissolved by mutual consent. *Van Kuren v. Trenton Locomotive and Machine Manuf. Co.* 13 N. J. Eq. 302.

interest; until, &c. For like order as to any stock, with injunction against the bank, see *White v. White*, 2 Seton Dec. (Eng. ed. 1862) 920.

## 11. RAILWAYS.

### (a.) *Railway Co. enjoined from continuing in possession or entering on land.*

This Court doth order that an injunction be awarded against the defendants, the L. V. Ry. Co., to restrain the defendants, their contractor, servants, agents, and workmen, from continuing in possession of the piece of land thirdly described, in the indenture of lease in the plaintiffs' bill mentioned, and whereupon the defendants have entered, or any part thereof; and from entering upon, taking, or using the said piece of land, or any part thereof, without the consent of the plaintiffs first had and obtained; until, &c. 2 Seton Dec. (Eng. ed. 1862) 928.

### (b.) *Declaration of right to use railway; rents, damage; compensation for occupying land not authorized to be taken; injunction.*

Declaration of plaintiffs' right to the use of the railway in the pleadings mentioned for the purpose of carrying coal, &c., upon payment of an ascertained annual rent to the land-owner. — And it is ordered, that it be referred to, &c., to take an account of what is due from the plaintiffs in respect of such rent; what reported to be due to be paid within twenty-one days from date of report. — And it is also ordered that the said Master do inquire "what is the amount of damage that has been sustained by the plaintiffs by reason of the defendant having pulled up the rails and impeded and prevented the use of the said railway, as in the bill mentioned; and that he also inquire, what is the amount of compensation to be paid to the defendant, for the use and occupation of the land whereon has been erected the engine-house, \*2321 in, \* &c., mentioned, since the — day of —." Injunction to stay defendant preventing plaintiffs replacing the rails and restoring the railway, from using it as heretofore, so as not to injure defendant's land, as long as plaintiff is entitled to use the railway; defendant to pay plaintiffs' costs of suit to this time. *Mold v. Wheatercroft* (1859), 2 Seton Dec. (Eng. ed. 1862) 929.

### (c.) *Decree declaring the exclusive rights of a railroad corporation under its charter, and enjoining competing lines.*

This cause coming on to be heard at the term of October, 1863, before his Honor H. W. G., Chancellor of the State of New Jersey, at Trenton, upon the pleadings and proof in said cause, and having been duly argued by the counsel of the said parties, and the Chancellor having taken time to advise thereon until the term of February, 1864, when further time was taken to settle the forms and terms of the decree then

pronounced, and now at this time, that is to say, on the sixteenth day of May, 1865, the Chancellor is of opinion, that by virtue of the Acts of the Legislature of the State of New Jersey, bearing date, &c.

*(Here state the acts and the purpose and effect of them as contracts — to protect from competition — and the business to be protected.)*

And the Chancellor is further of opinion, that the said contract and the said Acts of the Legislature are not repugnant to, or in violation of, &c. *(State what — and the duty of defendants to respect the contract.)*

And the Chancellor is further of opinion, that the incorporation of, &c. *State the acts which constitute a violation of the exclusive privilege*; the Chancellor is further of opinion, that the said acts on the part of the said defendants, are a violation of the exclusive rights and privileges of the said plaintiffs; and that the plaintiffs are entitled to relief, and to the aid of this Court, and the protection of such rights and privileges, and to an account of all such use of said railroads and branches, and of such transportation, and to the damages they have sustained by such violation of their said exclusive franchise, and to the injunction prayed for in their supplemental bill, with their costs to be taxed.

Therefore the Chancellor doth order, adjudge, and decree that the said defendants and their confederates, their and each of their officers, contractors, servants, and agents, do absolutely desist and refrain from further transporting, or aiding or assisting in the transporting of passengers or merchandise from city to city, between the cities of New York and Philadelphia; and that the said defendants, the Raritan and Delaware Bay Railroad Company and the Camden and Atlantic Railroad Company and their confederates, contractors, and agents, desist and refrain from further permitting or allowing their respective railroads, engines, cars, or machinery, to be used for the purpose of

\* carrying on such transportation of passengers or merchandise \* 2322 from city to city between the said cities, or for the purpose of aiding or assisting in the transportation of passengers or merchandise between the said cities from city to city; and that the said corporation defendants, their confederates, contractors, and agents, severally desist and refrain from forwarding and from aiding or assisting to forward, and from permitting or allowing to be forwarded by way of the said railroads and branches, or any part thereof, from any point or place in this State to any other point or place in this State, any passengers or merchandise which are, or may be, in the course of transportation from city to city between the said cities of New York and Philadelphia, and that all the said other defendants desist and refrain from aiding and abetting the said corporate defendants, or either of them, in any such forwarding of passengers or freight; and that the defendants, and each of them, together with their confederates, contractors, and agents, desist and refrain from doing any act or acts for or towards or in aid of the transportation of passengers, freight, or merchandise between New York and Philadelphia by way of said railroads, or either of them, or any part thereof, or said branches, either by using or permitting to be used the different sections thereof for that purpose in connection

with each other, or by using the said railroads, or any part thereof, or said branches, in connection with any steamboat or steamboats; and that the said corporation defendants desist and refrain from permitting their respective roads, or any section or sections thereof, to be used for any such last-mentioned purpose; and that said defendants respectively, and their confederates respectively, desist and refrain from performing, aiding, or contributing to the transportation of passengers or freight from city to city aforesaid, across the said railroads, or any part thereof, and upon steamboats running in connection therewith, by any other device or contrivance whatsoever; and that an injunction do issue out of and under the seal of this Court, directed to the said defendants and their confederates, their and each of their officers, agents, contractors, servants, and workmen, commanding and enjoining them, and each and every of them, that they, and each and every of them, desist and refrain from the acts aforesaid, which by this decree it is ordered, adjudged, and decreed, they shall desist and refrain from doing. And it is further ordered, adjudged, and decreed that the said defendants do pay to the plaintiffs their costs of this suit to be taxed, and the damages sustained by the plaintiffs by the unlawful acts of the defendants; and that it be referred to J. W., Esquire, one of the Masters of this Court, to take an account of all passengers and freight carried on the railroads of the said corporation defendants, or on any part thereof, in course of transportation from city to city aforesaid, distinguishing what passengers were soldiers, and what freight was horses or munitions of war transported by order of or for the use of the Government of \*2323 the United \*States, and to take an account of and ascertain the damages sustained by the plaintiffs by the violation of their exclusive franchise by the defendants; and that the parties be examined before the Master, and that the Master proceed with all convenient speed; and that the defendants pay to the plaintiffs, as well their costs in this suit to be taxed, as the damages aforesaid, and that the plaintiffs have liberty to apply on the part of this decree in case of further violation of said exclusive franchise by any device or means whatsoever; and all further equity is reserved until the coming in of said report. *Rar. & Del. R. Bay Co. v. Del. & Rar. Canal and C. & A. R. and T. Cos., 2 Beasley (N. J.) 546.*

## 12. MANDATORY.<sup>1</sup>

### *Enjoining the return of documents.*

This Court doth order that an injunction be awarded to restrain the defendant H. from detaining and keeping possession of the books, deeds, documents, and papers removed as mentioned in the plaintiffs' affidavit by the said defendant, or by his order, from the chambers occupied by the plaintiffs, for retaining which no written authority has

<sup>1</sup> See *ante*, p. 1661, 1681, and notes. As to mandatory injunctions, see *Senior v. Pawson*, L. R. 3 Eq. 339; *Beadel v. Perry*, L. R. 3 Eq.

465; *Att.-Gen. v. Mid-Kent Ry. Co.* L. R. 3 Ch. 100; *Knapp v. Douglas Axe Co.* 13 Allen 1.

been produced by the defendant, as mentioned in the plaintiffs' affidavit of, &c., or any of them, except the five boxes not claimed by the plaintiffs, and from permitting the same or any or either of them, except the said five boxes, to remain away from the office of the plaintiffs, or from parting with the books, &c., removed by the defendant, or by his order, from the chambers occupied by the plaintiffs, or any of them, except the said five boxes, to any person or persons other than the plaintiffs, and from destroying, mutilating, or obliterating the said books, &c., or any or either of them, except as aforesaid, or any parts or part thereof respectively, or any entries or entry therein, or from making any alteration, interlineation, or erasure in the same, or any of them; until, &c. 2 Seton Dec. (Eng. ed. 1862) 936.

### 13. GENERAL.

*Restrainig a town and its officers from paying out money for unauthorized purposes.<sup>2</sup>*

And the inhabitants of the said town of B., and all their officers and \* servants, are hereby enjoined and commanded that \* 2324 they apply the said money to the payment of the legal debts and liabilities of the town, and to no other purpose; and that they shall not at any time, by their vote, or by taxation, or by pledge of the credit of the town, or by the use of its funds, or in any other manner, make any provision, directly or indirectly, for the payment of the money mentioned in the said claims of J. H. and S. O. M., and of E. B. G., set forth in the bill, nor any part thereof, or for the indemnity, in whole or in part, of any person or persons by whom said sums of money have been paid or may hereafter be paid, in whole or in part, or of any persons who may be interested in the same, or in any way, directly or indirectly, to evade the true intent and effect of this decree.

### 14. WRIT OF INJUNCTION RESTRAINING ONE HOLDING PROPERTY OF A FOREIGN DEBTOR WHICH COULD NOT BE ATTACHED AT LAW FROM TRANSFERRING OR DISPOSING OF IT.

Commonwealth of Massachusetts.

S—, ss.

To H. E., of B., in said County, his servants, agents, attorneys, and counsellors, and each and every of them,

GREETING:

Whereas it has been represented unto the Justices of our Supreme Judicial Court, now holden at Boston, within and for said county, sitting as a Court of Chancery, that the Columbia Insurance Company, of

<sup>2</sup> Frost v. Belmont, 6 Allen, 152. See form of bill in such a case in Merrill v. Plainfield, 45 N. H. 126.

The injunction will not be dissolved in such

a case as to the particular officers named as defendants, although they have ceased to hold the respective offices named. Clark v. Wardwell, 55 Maine, 61.

Columbia, South Carolina, is a foreign insurance company, and that said company is largely indebted to D. S., of N., in the County of E., as in said D. S.'s bill of complaint, this day filed in our said Court, is alleged, and that the said company have no property in this Commonwealth which can be come at to be attached or taken on execution, and that you the said H. E., have a large amount of the property of the said company now in your possession; consisting chiefly of valuable promissory notes belonging to said company,

We, therefore, in consideration of the premises, do strictly enjoin and command you, the said H. E., and all and every the persons before named, from passing any promissory notes or other property now in your possession, or under your control, belonging to the said Columbia Insurance Company, into the possession of any person whatever, and especially not into the possession or control of the said company, or any officer or agent of the same; but to keep and retain the same in your own hands, until the further order of our said Court or some one of the Justices thereof.

Witness, L. S., Esquire, at B., this — day of —.

G. C. W., Clerk.

\* 2325

## \* 15. DISSOLVING OR CONTINUING.

*(a.) Injunction dissolved or continued on motion.*

Upon motion, &c., by counsel for the defendant [*if plaintiff appears,* and upon hearing counsel for the plaintiff], and upon reading the order dated, &c. [*enter affidavits and answers, if any, and if plaintiff does not appear,* an affidavit of service of notice of this motion on the plaintiff]. This Court doth order, that the injunction awarded by the said order, dated, &c., do stand dissolved [*or, be continued until the hearing of this cause, or until the further order of this Court*].

*(b.) Continued at the hearing.*

And it is ordered that the injunction awarded against the defendant H. by the order, dated, &c., be continued until further order.

## 16. PERPETUAL AT HEARING.

*Decree making injunction perpetual as to copyright.*

This Court doth order that the injunction granted (awarded) in this cause to restrain the defendants, their servants, agents, or workmen, from printing, publishing, or vending a book, comedy, or farce, called, &c., or any part thereof, be made perpetual; and the plaintiff (by his counsel) waiving the account prayed by the bill, the Court doth not think fit to direct any account. Defendants to pay plaintiff's costs.

2 Seton Dec. (Eng. ed. 1862) 944.



# 17. BREACH OF INJUNCTION.

## (a.) Committal for breach of injunction.

Whereas the plaintiff, on the — day of —, obtained an injunction [*Recite injunction; or, if writ not issued and served, whereas by an order dated, &c. Recite order for injunction*]. Now, upon motion, &c., and upon [*if the defendant appears, hearing counsel for the defendant and*] reading [*if the defendant does not appear, an affidavit of, &c., filed, &c., of notice of this motion to the defendant*] the said order, the affidavit of, &c. [*enter evidence*]; and this Court, being of opinion, upon consideration of the facts disclosed by the said affidavit of, &c. [*or, the said affidavits*], that the said defendant has been guilty of a contempt of this Court by a breach of the said injunction, doth order that the said defendant A. do stand committed to the — prison for his said contempt. 2 Seton Dec. (Eng. ed. 1862) 945.

\* (b.) Committal to secure appearance to answer for breach \* 2326 of injunction.

State of V.,  
C — County, ss. } To any Sheriff, &c.,

## GREETING:

By authority of the State of V., you are hereby commanded to attach the body of A. W. P. and him safely keep by committing him to jail at I—, in the County of O—, to the jailer therein, who is ordered to receive him and hold him, so you have him to appear before the Chancellor at the next term of the Court of Chancery at I—, in the County of O—, on the — day of —, A. D. 18—, then and there to answer to the complaint aforesaid of S. M. F. and J. C. S. for an alleged contempt, and to abide the order of Court therein. Provided, nevertheless, that, at any time before the next term aforesaid, the said A. W. P. may be released from confinement by order from the clerk of the Court of Chancery in said county, on filing with the clerk of said Court a good and sufficient bond, with surety or sureties, to and in favor of said plaintiffs, in the sum of — dollars, conditioned that the defendant then and there appear in said Court of Chancery and before any Chancellor then and there present, and continue to appear from day to day and from term to term until the matters of the complaint be finally disposed of, and stand to and abide by all orders and pay all fines, damages, or costs, made or imposed in the premises.

Hereof fail not, but make due service and return.

Given under my hand, at —, in the County of —, this — day of —, A. D. 18—.

B. H. S., Chancellor.

(c.) *Final decree after a hearing in regard to the damages, costs, and fine to be imposed for a breach of an injunction, and warrant of attachment and committal to secure the payment of the same.*

J. C. S. v. A. W. P. { Court of Chancery, O—— County,  
— Term, 18—.

This cause having been fully heard, so far as the complaint for contempt is concerned, upon the proofs, allegations of the parties, and the argument of their respective solicitors, and having been duly considered by the Court, it is adjudged that said A. W. P. has been guilty of a contempt in manner and form as alleged in the complaint, in that he did wilfully violate said order of injunction in said complaint referred to, by selling and removing, or causing to be removed, into the province or dominion of Canada, and beyond the reach of the process of this Court, a certain steam-engine and elevator, and other machinery attached and connected therewith, included within the terms of said injunction, and did commit other waste upon the masonry of said  
\* 2327 limekiln, \* as the plaintiffs have complained against him; and it is considered and adjudged that the damage to the plaintiffs by the defendant's said unlawful act is the sum of — dollars, and said A. W. P. is hereby ordered and decreed to pay forthwith to the clerk of the Court of Chancery, in the County of —, for the plaintiffs, said sum of — dollars, with the costs of this proceeding, to be taxed by the clerk; and also to pay to said clerk, for the treasury of the State of V——, the sum of — dollars as a further fine on this behalf; and it is further ordered and decreed that said A. W. P., in default of immediate and full payment of said several sums of money, be committed to prison in the county jail at I——, in said O—— County, and be therein confined until said several sums, with interest thereon from this day, together with costs of commitment and confinement in jail, shall be fully paid.

Done in Court, this — day of —, A. D. 18—.

B. H. S., *Chancellor.*

State of V. }  
O—— County, ss. } To any Sheriff, &c.,

#### GREETING:

By the authority of the State of V——, you are hereby commanded to attach the body of A. W. P., of —, in said County, and, unless he shall forthwith pay, or cause to be paid, the several sums of money in the foregoing decree of the Court of Chancery ordered to be paid, the said A. W. P. having been adjudged guilty of a contempt as is therein set forth, you will proceed and commit the said A. W. P. to prison in the common jail, in I——, in said O—— County; and you will lodge with the keeper of said prison a true and attested copy of this precept and of the foregoing decree; and the keeper of said prison is commanded to receive the said A. W. P. within said prison, and to keep and hold him

a prisoner within said prison until he shall pay said several sums, interest, and cost, as in said decree required.

Given under my hand, at —, in th County of —, this — day of — A. D. 18—. .

B. H. S., *Chancellor.*

(d.) *Sequestration.*

Whereas by an order, &c., the defendants, the Manchester, &c., by their counsel, undertaking, &c. [*Recital of order*]; now upon motion this day made, &c., who alleged that it appears by the affidavit of, &c., that the defendants have not complied with their said undertaking, by permitting the plaintiffs to use their railway and conveniences connected therewith from C. to S., and upon hearing counsel for the defendants, and reading the said affidavits, and the affidavit of, &c. And \*this Court being of opinion, that the defendants, the Man- \*2328 chester, &c., have committed (been guilty of) a contempt of this Court in not complying with their undertaking, to permit the plaintiffs to use their railway and conveniences connected therewith from C. to S., in the said order, dated, &c., mentioned, doth order, that a commission of sequestration do issue, directed to certain commissioners to be therein named, to sequester the personal estate, and the rents, issues, and profits of the real estates of the said defendants, the Manchester, &c., until the further order of this Court. 2 Seton Dec. (Eng. ed. 1862) 946. See Att'y-Gen. v. G. N. Ry., 4 D. & S. 89; Shrews. & B. Ry. v. Stour Val. Ry., 2 D. M. G. 866.

18. NE EXEAT REGNO.

(a.) *Order for writ to issue.*

Upon motion, &c., and upon reading an affidavit of, &c., filed, &c., [*enter evidence, and if before appearance.* and the clerk's certificate of the filing of the plaintiff's bill in this cause on the — day of —]; and the plaintiff by his counsel undertaking, &c. [*as to damages*]; This Court doth order, that a writ [*or, one more writ or writs*] of *ne exeat regno* do issue against the said defendant A., until this Court make another order to the contrary; and the said writ [*or, writs*] is [*or, are*] to be marked for security in the sum of \$— in words, at length, and not in figures. 2 Seton, Dec. (Eng. ed. 1862) 959.

(b.) *General form of the writ.*

To the sheriff of, &c.,

GREETING :

Whereas it is represented to us in our Court of Chancery, on the part of A. B., plaintiff, against C. D., defendant, amongst other things, that he, the said defendant, is greatly indebted to the said plaintiff, and designs quickly to go into parts beyond the seas, as by oath made in

that behalf appears; which tends to the great prejudice and damage of the said plaintiff. Therefore, in order to prevent this<sup>1</sup> injustice, we do hereby command you, that you do, without delay, cause the said C. D. personally to come before you, and give sufficient bail or security, in the sum of — (*amount mentioned in the order for the writ*), that he, the said C. D., will not go or attempt to go into parts beyond the seas, without leave of our said Court, and in case the said C. D. shall refuse to give such bail or security, then you are to commit him, the

\* 2329 said \* C. D., to our next prison; there to be kept in safe custody until he shall do it of his own accord. And when you shall have taken such security, you are forthwith to make and return a certificate thereof to our said Court of Chancery, distinctly and plainly under your seal, together with this writ.

Witness —, at —, the — day of —, in the year 18—.

(c.) *Writ discharged on defendant giving security.*

Upon appeal motion from order of, &c., dismissing defendant's motion, and for leave to go out of the jurisdiction for — months, he undertaking then to return, it is ordered, that upon the defendant M. giving security to the amount of \$—, with two sureties, such security to be approved by the Court [*or Judge, or Master*], to answer such sum as may be found due from him in this cause, the writ of *ne exeat regno* issued in this cause be discharged; and it is ordered, that the order of, &c., dated, &c., be also discharged, except so much thereof as ordered that the defendant M. should pay to the plaintiff his costs of that application. to be taxed, &c. *Lee v. Melendez* (1849), 2 Seton, Dec. (Eng. ed. 1862) 960.

(d.) *Order for examination of defendant as of poor debtor. (Massachusetts.)*

It is ordered by the Court, that "W. J. H., Esquire, a Master in Chancery for the county of —, be, and he hereby is, appointed to take the examination of said H. (the defendant), upon the petition for his discharge from arrest upon a writ of *ne exeat regno*, sued out by the plaintiffs in the said county of S., in the same manner and with the same effect as if he were a debtor offering to take the poor debtor's oath; to take the examination in writing upon interrogatories, and report the same to one of the Justices of this Court, as soon as may be. Due notice of the time and place of the examination to be given to the solicitor of the plaintiffs." *Rice v. Hale*, 5 Cush. 244.

<sup>1</sup> "His," in Braithwaite's Pr. 229, 231; "this" in Hinde, 613; Beames on *Ne Exeat*. Veal's Pr. 73, 75; Harr. by Newl. 537; but 23.

(e.) *Notice of motion for the discharge of the writ.*

In Chancery.

(*Title of cause or matter.*)

Take notice, that this Honorable Court will be moved before (*state what Judge or Court*), on —, the — day of —, instant [*or, next*], at — o'clock in the — noon, on the part of the defendant, C. D., that the writ of *ne exeat regno* issued against him pursuant to the order dated the — day of —, 18—, and the said order, may be discharged with costs, including the costs of this application; and that \* the plaintiff may be ordered to pay such costs to the said \* 2330 defendant, — *If so*; and that the bond given by the said defendant to the sheriff of —, pursuant to the said order and writ, may be delivered up to be cancelled. And that an inquiry may be made what damages have been sustained by the said defendant by reason of the said order having been made. And that the plaintiff may be ordered, pursuant to his undertaking, contained in the said order, to pay to the said defendant, within (one month) after the date of the Master's certificate of the result of such inquiry, what shall be thereby certified in respect of such damages.

(f.) *Ne exeat discharged; inquiry as to damages and payment according to undertaking.*

The Court doth order, that the writ of *ne exeat regno* issued against the defendant M. pursuant to the order, dated, &c., and the said order, be respectively discharged with costs, including the costs of this application, such costs to be taxed, &c., and paid by the plaintiffs, S., &c., to the said defendant M.; and that it be referred to, &c., to inquire and report what damages have been sustained by the said defendant, M., by reason of the said order, dated, &c., having been made; and that the plaintiff S., &c., pursuant to their undertaking contained in the said order, within one month after the date of the Master's report of the result of the said inquiry, pay what shall be certified in respect of such damages to the said defendant M. Liberty to apply. *Sickell v. Raphael* (1861), 2 Seton Dec. (Eng. ed. 1862) 960.

SECTION II.

INTERPLEADER.

1. STAYING PROCEEDINGS.

(a.) *Injunction on motion upon payment into Court.*

It is ordered, that the plaintiffs W. and B. be at liberty to pay the sum of \$— insured on the life of H., into the bank, with the privy, &c., to the credit of this cause; and thereupon, it is ordered, that an

injunction be awarded to restrain the defendants F., and M. his wife, from proceeding in the action at Law commenced by them against the plaintiffs, as in the bill mentioned; and to restrain the said defendants from commencing or preventing any action or actions, suit or suits, or other proceedings against the plaintiffs, or either of them, to recover the money insured by the policies in the bill mentioned.—Direction for investment when paid in. 2 Seton Dec. (Eng. ed. 1862) 962.

\* 2331      \* *(b.) Same; on undertaking as to the subject-matter.*

Plaintiffs sold resin to Ws., but retained possession at Ws.' request, Ws. resold to B., who, before delivery, became bankrupt. Actions were brought against plaintiffs by Ws., and by C., &c., B.'s assignees. Blann was assignee under trust deed for the creditors of Ws.

And the plaintiffs (by their counsel), undertaking not to part with the — tons of resin mentioned in the plaintiffs' bill, until the further order of this Court, and also undertaking to give a notice of motion that the said — tons of resin may be sold and the proceeds thereof paid into Court, it is ordered that an injunction be awarded to restrain the defendants Ws. and C. from prosecuting the actions at law commenced by them respectively against the plaintiffs, for or in respect of the — tons of resin in the bill mentioned, and also to restrain the said defendants, together with the defendant Blann, from commencing or prosecuting any further or other action or suit against the plaintiffs, for or in respect of the said — tons of resin; until, &c. 2 Seton Dec. (Eng. ed. 1862) 962.

*(c.) Interpleader in favor of bank; United States Circuit Court cannot enjoin suit in State Court; injunction on action in United States Court; unless adverse parties elect to interplead; in case of such election funds due paid into Court.*

This cause came on to be heard and was argued by counsel, and thereupon, upon consideration thereof, it appearing to the Court that the plaintiffs held the assets and funds in the bill mentioned for the true owner, without having or claiming any right or interest therein, and that they are ready and willing to deliver the same over to whomsoever may have right thereto; and it appearing to the Court that the defendants E. S. and M. A. F. have heretofore filed their bill in the Court of Chancery in the State of, &c., against the plaintiffs and the defendant P. R. Y., alleging the full right and title to the said funds and assets to be vested in and to belong to the said E. S. and M. A. F.; and it appearing to the Court that the plaintiffs and the said P. R. Y. entered their respective appearances in said suit in said Court of Chancery, and that said suit is still pending and undetermined; and it further appearing to the Court that after such suit was instituted the said P. R. Y. commenced in this Court in his own name, two separate actions at law against the plaintiffs, one in tort, in which he seeks to recover the value

of said funds and assets, and the other in contract, in which damages are demanded for the detention of the said assets, and that the plaintiffs have appeared in the said actions, and the same are yet pending and undetermined in this Court; it is considered by the Court that the plaintiffs are entitled to relief in this Court in Equity;

\* but, inasmuch as the suit instituted against the plaintiffs by \* 2332 the said E. S. and M. A. F., is prosecuted in the Court of Chancery, of the State of, &c., and the proceedings before that tribunal are not within the cognizance of this Court, or subject to its control, it is considered by the Court, that so much of the prayer of the said bill as seeks an interpleader in the premises, and prays the same to be decreed by this Court against the above-named defendants, ought not to be granted, and it is, therefore, ordered, that the same be denied. It is further ordered, that an injunction issue, according to the prayer of the the bill, against the said P. R. Y., restraining him from further prosecuting his said actions at Law, or either of them, instituted in this Court against the plaintiffs, until the final decision of the said suit pending in the Court of Chancery, of the State of, &c., unless the said P. R. Y. and E. S. and M. A. F. shall, within twenty days from the date of this order, file their stipulation in writing in this Court, electing to interplead between themselves in this Court in respect to the subject-matter aforesaid; and, in case of such interpleader between the said parties, it is ordered, that the said plaintiffs thereupon pay into this Court the funds and assets aforesaid, first deducting therefrom such their costs and expenses as shall be allowed them by the Court.

## 2. DECREE IN INTERPLEADER SUIT.

### (a.) *Direction to interplead ; payment of costs.*

For statement of case, see No. 1 (a.) p. 2327. This Court doth order that the parties interplead ; and for that purpose it is ordered that the defendants W., &c., proceed in the action of, &c., brought by them against the plaintiffs (as in the bill mentioned), with liberty for the defendants C., &c., the assignees of B., to defend such action. Direction to tax the plaintiffs' costs of suit, and also of the said action, and of the action brought by the defendants C., &c., against the plaintiffs, so far as they have proceeded; and to raise and pay such costs from proceeds of sale of the resin paid into Court. Adjourn, &c., until after trial. 2 Seton Dec. (Eng. ed. 1862) 964.

### (b.) *Action stayed as to policy money ; inquiry who entitled.*

(*By consent.*) Plaintiff to be at liberty to retain the sum of \$—— for his costs of the action at Law in the bill mentioned, and of this cause out of the sum of \$——, the amount due upon the policy in the bill mentioned. And it is ordered that the plaintiff M., on or before, &c., pay the sum of \$——, being the residue of the said sum of \$——, after such retainer, into the bank, &c., to the credit of the cause.

\* Directions to invest ; injunction to stay the defendant T. from \* 2333

prosecuting the action at Law commenced by her against the plaintiff, and to stay her and the other defendants from commencing or prosecuting any other action against the plaintiff or the Insurance Company in respect of any money due on the policy. And it is ordered, that all further proceedings in this cause be stayed as regards the plaintiff; and as between the defendants that an inquiry be made who is entitled to the said sum of \$——. *Macintyre v. Thomson* (1860), 2 Seton Dec. (Eng. ed. 1862) 964.

(c.) *Interpleader declaring the persons entitled; costs to be taxed as between solicitor and client, and paid out of fund; balance to be paid over to persons entitled; bill dismissed without costs, as to other defendants.*

Supreme Judicial Court.

SUFFOLK, SS.

In Equity.

C. G. L., Executor, v. I. T. *et al.*

This cause coming on to be heard, it appeared that the said Israel Thorndike, the elder, by his last will directed his executors, of whom the complainant [plaintiff] is the survivor, to place the sum of twenty thousand dollars in the office of the Massachusetts Hospital Life Insurance Company, in trust, to receive the income, and pay it annually to his son Andrew Thorndike, during his life, and at his decease, to take up the sum and pay it to the heirs-at-law of the said Andrew; that said deposit was made, and the income paid to the said Andrew during his life; that upon his decease Israel Thorndike, a brother of the said Andrew, brought his action at Law against the said executors, claiming one-sixth part of said fund as one of the heirs-at-law of the said Andrew; that, thereupon, the said complainant [plaintiff] filed his bill and amended bills in Equity against the said Israel and other persons, who would be the heirs-at-law of the said Andrew, if he had died unmarried and without lawful issue; and also against Katharina Bayerl Thorndike, claiming to be the lawful widow of the said Andrew; and against Andreas Thorndike and Anna Loring Thorndike, infants, claiming to be the lawful issue and heirs-at-law of the said Andrew, praying that the said Israel might be enjoined from prosecuting the said suit at Law, and that the several parties might interplead and present their respective claims for the consideration and determination of the Court; and thereupon the said parties did appear, by their respective counsel and guardians, and proofs being taken and read, and upon arguments of counsel, it was considered, and is now adjudged and decreed [declared], that the said Andreas Thorndike and Anna Loring

\* 2334 Thorndike \* are both children of the said Andrew, begotten upon the body of the said Katharina, before marriage; that afterwards the said Andrew was duly and lawfully married to the said Katharina, lived with her as his lawful wife, and openly and publicly acknowledged the said Andreas and Anna Loring to be his children and



heirs-at-law; that by reason thereof they are entitled, under the will of the said Israel Thorndike the elder, to the said sum of money to be divided between them in equal shares; and that the said Katharina is not entitled to any part thereof; and that the other defendants are not entitled.

And it appearing to the Court, by the statement of the said complainant [plaintiff], that he holds the sum of twenty thousand seven hundred forty-five dollars and twenty-seven cents, subject to the order and direction of the Court: It is further ordered and decreed, that he do pay to the solicitors, F. C. L., C. W. L., and A. D., their costs of counsel fees, to be taxed as between solicitor and client, and that the residue thereof be paid one-half part to J. G., guardian of the said Andreas Thorndike, and one-half part to W. I. B., guardian of the said Anna Loring Thorndike; and that the bill be dismissed as to the other defendants, without costs. *Loring v. Thorndike*, 5 Allen, 257.

By the order of the P. M., Esq.,

One of the Justices of the said Court.

G. C. W., *Clerk*.

March 30, 1863.

### SECTION III.

#### 1. ISSUES.

##### (a.) *Order for an issue.*<sup>1</sup>

"Inasmuch as it does not satisfactorily appear to the Court, that any agreement has been made by and between the parties, as to the amount of such damages and compensation [*in dispute*], to the end that the same may be satisfactorily ascertained, it is further ordered, adjudged, and decreed, that an issue be made up between the parties, to ascertain, by the verdict of a jury, &c., the amount of such damages and compensation." Directions as to the Court and term; form of the issue; restrictions on plaintiff in the trial; admissions to \* be \* 2335 made by defendant; allowances by the jury; "and that all further directions be reserved until the said issue shall be tried, and the postea returned to this Court." *Phillips v. Thompson*, reported 1 John. Ch. 152.

<sup>1</sup> See directions for an issue on the question of violation of copyright in *Emerson v. Davies*, 3 Story C. C. 798; Forms of Order, for issues in *Hoitt v. Burleigh*, 18 N. H. 390; *Tappan v. Evans*, 11 N. H. 311, 335. It is settled in New Hampshire, that a party to a bill in Equity has a constitutional right to require a trial by jury of a contested matter of fact, if he asserts that right at a proper stage

of the cause. *Hoitt v. Burleigh*, 18 N. H. 389. See *ante*, Vol. II. pp. 1075, 1076, in note. The proper stage for this seems to be after replication and before taking testimony. *Hoitt v. Burleigh*, *supra*. But the Court, for sufficient reasons, may cause issues to be framed after the testimony has been taken. *Hoitt v. Burleigh*, *supra*. See *ante*, Vol. II. p. 1110, in note.

(b) *Same.*

E—, ss.

S. J. C.

In Equity.

J. H., Ex'r v. D. P.  
D. P. v. J. H., Ex'r.

And now, after hearing the parties, it is ordered that issues be framed in the above cases, for the purpose of submitting to a jury the following questions :

1. What shares or proportions did G. H. [the testator] during his lifetime own in the lot or parcel of land first set out and described in the bill of said J. H., executor ?

2. Did G. H. [the testator] during his lifetime own any share or part in the lot of land secondly set out and described in the bill of said J. H., executor, and, if any, what share or part did he so own ?

A separate issue is to be framed for the purpose of presenting each of the above questions; in which the said executor is to aver the share or proportion which he claims that his testator owned in each of said lots or parcels of land; and the said D. P. is to traverse said averments; but in the issue embracing the inquiry as to the title to the first lot or parcel, described in the bill of said executor, the said D. P. will not be permitted to traverse the fact of title in said testator to some portions of said lot or parcel.<sup>1</sup>

The above issues are to be framed by the counsel and submitted to the Court for approval, on or before the — Tuesday of — next, on which day a further order will be passed for the trial thereof. [Hodges v. Pingree, Essex Co., Mass., Jan. 18, 1860, G. T. B., J. S. J. C.]

(c.) *Same.*

P—, ss.

S. J. C.

In Equity.

J. A. v. C. L.

And now, on motion of the plaintiff, and after hearing the parties, the Court doth think fit and proper, and doth order that the matters of fraud alleged in the bill, and in dispute in this cause, be tried and determined by a jury on the following issue to be joined, viz., &c.

\* 2336

\* (d.) *Same.*

“And now, upon motion of the parties and due examination of the pleadings, the Court doth think fit and proper [and doth order] that the matters in dispute in this cause be tried and determined by a jury upon the following issues to be joined, viz.” “And it is further ordered, that the said issues stand for trial at the — next to be held in the county of —, on the, &c., and that upon the trial of said issues, the answer of the defendant and the plaintiff's bill, and the depositions now on file may be read, and that either party may offer any competent evi-

<sup>1</sup> See *ante*, Vol. II. p. 1112, and note. For Form of Issue as to the existence of a partnership, see *Drope v. Miller*, 1 Hemp. 49, 50.

dence under the directions of the presiding Judge. And all further directions are reserved until after the trial of said issue."

(e.) *Issue devisavit vel non. Modern Form. [English.]*

And this Court being desirous of having the following question of fact decided by a jury, that is to say: "Whether the paper writing dated, &c., in the pleadings mentioned, purporting to be the will of C., of, &c., is or is not the last will and testament of the said C. It is ordered that an issue [*or, issues*]," &c.

(f.) *Issues as to clause in will.*

It is ordered that the parties proceed to a trial at Law, at the — next to be holden, &c., on the following issues: 1. Whether H., late of, &c., deceased, did, in and by a certain paper writing, dated, &c., purporting to be a codicil to the last will and testament of the said H., devise in manner and form following, that is to say, &c. [*stating part not disputed*]; 2. Whether the said H., having in and by his will dated, &c., from and after, &c., devised, &c., did by his said codicil devise in manner and form following, that is to say, &c. [*stating part disputed*]." Defendant H. to be plaintiff at Law.

(g.) *As to validity of bond.*

This Court being desirous of having the following questions of fact decided by a jury, that is to say: 1. Whether the bond and warrant of attorney was obtained by the plaintiff by means of any fraudulent (or unfair) representations by the obligees or any of them; 2. Whether the same was obtained by any untrue representation; 3. Whether the same was obtained by any fraudulent (or unfair) concealment or suppression by the obligees, or either of them; 4. Whether the bond, &c., was given to secure any debt or liability, other than the whole or part of the balance due from P. to the firm in the pleadings mentioned. *Parker v. Morrell*, 2 Ph. 453; 2 Seton Dec. (Eng. ed. 1862) 985. "Unfair" was objected to by the L. C.

\* (h.) *As to sanity, and validity of deed; fraud.* \* 2337

1. Whether M., in, &c., named, at the time of the execution of the indentures dated, &c., in, &c., mentioned, was of sound mind, understanding, and capacity to execute the said deeds; 2. Whether the said deeds were obtained from the said M. by fraud or imposition.<sup>1</sup>

(i.) *Issue as to damages.*

For issue in injunction suit, "Whether the plaintiffs, to the damage or injury of the defendant, prevented the defendant from completing his

<sup>1</sup> For Form of Order for Issue to try a question of lunacy, see *Matter of Wendell*, 1 John. Ch. 603.

contract." Plaintiffs to admit that they did so prevent, and employ their own workmen to complete. 2 Seton Dec. (Eng. ed. 1862) 987.

(j.) *Issues as to right of way.*

For issues: "1. As to right of way through a place called 'George yard;' 2. If there be any such right, whether it extends over the whole; 3. If not, what is the extent, length, breadth, and direction of it; 4. Whether any such right has been obstructed or disturbed by the defendants, or any of them, and if so, in what manner and to what extent; 5. Whether there is any public right (other than a right of way) over the whole; 6. Whether such right, if any, has been obstructed or disturbed by the defendants, &c." Direction for special circumstances to be indorsed on the postea. 2 Seton Dec. (Eng. ed. 1862) 988.

(k.) *Directions after issues awarded. (N. H.)*

"The plaintiff in this case having, on motion, obtained an award of issues to be tried by the jury, which are already framed and settled, and filed in the cause, it is ordered, that said issues be sent to the trial term of this Court, in this county, for trial by the jury, the verdict thereon to be certified to the law term of this Court. And it is further ordered, that the plaintiff here shall be regarded as the plaintiff in the trial of these issues, and that the parties upon the trial may read the bill and answers, and any evidence legally taken to be used on the hearing in Chancery, unless in cases where the attendance of any of the witnesses is actually procured; and also may offer such other and further evidence, including the testimony of the parties, as in Law would be competent on the trial of such issues." [Clark v. Congregational Society, 44 N. Hamp. 382, 383.]

(l.) *Form of verdict indorsed on record. [English Form.]*

Afterwards on the — and — days of Jan. 1860, and on this day (before, &c.), came the parties within named, by their solicitors \*2338 and a \*jury of the county of Middlesex being summoned also came, who being sworn to try the question between the parties upon their oath say: "That the defendant B. did make or enter into, or give authority to make or enter into, the alleged agreement in the pleadings mentioned, dated," &c. Morrison v. Barrow (1860), 2 Seton Dec. (Eng. ed. 1862) 971.

(m.) *Another Form. (Mass.)*

"The jury find that the said O. M. F. did sign, execute, and deliver the agreement of compromise of which a copy is annexed to the plaintiff's bill marked (B.). And the jury further find that the signature of the said O. M. F. to the aforesaid agreement of compromise was not procured, brought about and effected by fraud, imposition, and false

representations on the part of the said F. L. and wife, and their agents.”<sup>1</sup> [Leach and wife v. Fobes, Plymouth Co., Mass., 1858.]

## 2. ORDER FOR NEW TRIAL.

### (a.) *Modern Form.*

It is ordered that the parties proceed to a new trial of the issue directed in this cause by the order dated, &c., at the next —, &c., to be holden, &c., in the manner directed by the said order. Short v. Macaulay (1857), 2 Seton Dec. (Eng. ed. 1662) 990.

## 3. ORDER ON EQUITY RESERVED AFTER TRIAL OF ISSUE.

This cause coming on (the — day of —, and) this day to be heard and debated before this Court, &c., in the presence of counsel learned for, &c., upon the equity reserved by the order dated, &c. the parties having, pursuant to the said order, proceeded to trial of the issue [*or, several issues or question or questions of fact*] thereby directed before the Court of, &c., at the sittings, &c., where the jury found, &c. [*state from the postea*], upon opening and debate of the matter, and hearing the said order and the postea [*enter any other evidence*] read, and was alleged, &c. This Court, &c., doth, &c.

## 4. VARIOUS ORDERS ON THE EQUITY RESERVED.

### (a.) *After issue as to will in administration suit; costs.*

Directions to establish will, administer estate, and tax costs of suit to all parties as between solicitor and client. “And in like manner to \*tax the several parties to the issues directed by \* 2339 the decree made in this cause, their costs of such issues and incident thereto.” Plaintiffs to retain and pay costs out of personal estate, and be allowed them in account. Usual directions.

### (b.) *After issue as to clause in will.*

This Court doth declare, that it appears, by the finding of the jury, that the part of the codicil of the testator H., whereby he expressed himself as follows, &c., does not constitute the will of the testator; And that the part of the codicil of the testator, whereby he expressed himself as follows, &c., doth constitute the will of the testator; and that one part of the said codicil constituting, and another part thereof not constituting, the will of the testator, this Court cannot order the same to be given up; but it being consonant to equity that the parties should stand in such a situation as if the said codicil could be delivered up, the Court doth declare, that so much of the said codicil as does not constitute the will of the testator is void, and that the devise to the heirs of the body of the testator, contained in his said codicil

<sup>1</sup> This verdict was signed by each of the jury.

ought not to take effect; And doth decree the same accordingly; And it is ordered that the defendant S. H. be restrained from setting up any title at law to the several estates so devised to the heirs of the body of the testator, contained in the said codicil, and in question in these causes. 2 Seton Dec. (Eng. ed. 1862) 993, 994.

## SECTION IV.

## RECEIVERS.

## 1. APPOINTMENT OF RECEIVERS.

*(a.) Order for Receiver of real and personal estate.*

Let a proper person be appointed to receive [*or*, let A., of, &c., upon his giving security, be appointed to receive] the rents and profits of the real [freehold and (*or*) leasehold] estates [*if so*, and to collect and get in the outstanding personal estate] of B., the testator [*or*, intestate], in the bill [*or*, pleadings] named [*or*, the rents and profits of the real, &c., estates comprised in the indenture dated, &c., in the bill, &c., mentioned]; And the tenants of the said real [freehold and (*or*) leasehold] estates are to attorn and pay their rents in arrear and growing rents to such Receiver; (And let the defendants C. and D., the executors of the will of the testator, [*or*, administrators of the \* 2340 \* effects of the intestate], deliver over to such Receiver, all securities in their hands for such outstanding personal estate, together with all books and papers relating thereto); And let such Receiver from time to time pass his accounts, and pay the balances which shall be certified to be due from him into, &c., to the credit of this cause; And let such balances, when so paid in, be laid out, &c. 2 Seton Dec. (Eng. ed. 1862) 1002.

*(b.) Recognizance by a Receiver and his sureties, pursuant to a decree or order. [English Form.]*

L. M. [*the principal*], of, &c., C. D., of, &c., and E. F., of, &c. [*the sureties*], before our Sovereign Lady, the Queen, in her High Court of Chancery personally appearing, do acknowledge themselves, and each of them doth acknowledge himself, to owe the Right Honorable John Lord Romilly, the Master of the Rolls, and the Right Honorable Sir John Stuart, knight, the Senior Vice-Chancellor of the said Court, the sum of £—, of good and lawful money of Great Britain; to be paid to the said John Lord Romilly, and Sir John Stuart, or one of them, or the executors or administrators of them, or one of them; and unless they do pay the same, they, the said L. M., C. D., and E. F., are willing and do grant, and each of them is willing and doth grant, for himself, his heirs, executors, and administrators, that the said sum of £— shall be levied, recovered, and received, of and from them and each of them, and of and from all and singular the manors, messuages, lands, tenements, and hereditaments, goods, and chattels of them and each

of them, wheresoever the same shall or may be found. Witness our said Sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and so forth, at Westminster, the — day of —, in the — year of her reign, and in the year of our Lord 18—.

Whereas by a decree [*or, order*] of the High Court of Chancery, made by his Lordship the Master of the Rolls [*or, his Honor the Vice-Chancellor —*], in a cause wherein A. B. [*and another, or, others are plaintiffs — or*] is plaintiff, and C. D. [*and another, or, others are defendants — or*] is defendant (18—, B. No. —), — *or, in a certain matter there depending intituled, “In the matter of —,” and dated the — day of —, 18—, it was ordered [recite so much of the decree or order as directs a proper person to be appointed, or that the person therein named be appointed, on giving security, as thus:]* that a proper person should be appointed to receive [*or, as the above bounden L. M., on first giving security, should be appointed Receiver of*] the rents and profits of the real estate, and to collect and get in the outstanding personal estate of A. B., the testator in the bill named;

And whereas the Judge to whose Court the said cause is attached \* hath [*if the Receiver has not been approved by the decree* \* 2341 *or order, add:]* approved of the said L. M. as a proper person to be such receiver, and hath approved of the above bounden C. D. and E. F., as sureties for the said L. M.; and hath also approved of the above-written recognizance, with the under-written condition, as a proper security to be entered into by the said L. M., C. D., and E. F., pursuant to the said decree [*or, order*], and the General Orders of the said Court in that behalf; and in testimony of such approbation, the chief clerk of the said Judge hath signed an allowance in the margin hereof;

Now the condition of the above-written recognizance is such, that if the said L. M. do and shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the real estate, and in respect of the personal estate, of the said A. B., at such periods as the said Judge shall appoint; and do and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court or Judge hath directed, or shall hereafter direct, then the above recognizance shall be void, and of none effect; otherwise, the same is to be and remain in full force and virtue.

L. M. } Taken and acknowledged by the above-named L. M., C. D.,  
C. D. } and E. F., at —, in the (county) of —, this — day of  
E. F. } —, 18—.

Before me.

[*Signature of officer or commissioner by whom the recognizance is taken.*]

(Short title.)

The Master of the Rolls [*or*, Vice-Chancellor], the Judge to whose Court this cause [*or*, matter] is attached, has approved of and allowed this recognizance.

R. M., *Chief Clerk.*

(c.) *Recognizance by a Receiver and his sureties, before an order to approve or appoint has been made.*

*Proceed as in next preceding number to the first whereas; and continue thus:* Whereas his Lordship the Master of the Rolls [*or*, his Honor the Vice-Chancellor —], on an application lately made to him at Chambers, in a cause now pending in the High Court of Chancery, wherein G. H. [*and another, or, others — are plaintiffs — or,*] is plaintiff, and J. K. [*and another — or, others — are defendants — or,*] is defendant [*or, in a certain matter now pending in the High Court of Chancery, intituled, "In the matter of —"*], hath approved of the above bounden L. M., on his giving security, as a proper person to be appointed to receive [*state what*], as thus: the rents and profits of the real estate, and to collect and get in the outstanding personal estate of A. B., \* 2342 the \* testator in the plaintiff's bill named], and hath approved of the above bounden C. D. and E. F., as sureties for the said L. M., and hath also approved of the above written-recognizance, with the under-written condition, as a proper security to be entered into by the said L. M., C. D., and E. F., pursuant to the General Orders. [*Continue as in next preceding number to the end.*]

(d.) *Another form of Recognizance or Receiver's Bond. (New York.)*

Know all men by these presents, that we, A. B., and C. D., all of the city, county, and State of New York, are held and firmly bound to the people of the State of New York, in the sum of — dollars, lawful money of the United States of America, to be paid to the said people; for which payment we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated the — day of —, in the year of our Lord one thousand eight hundred and —.

Whereas, by an order of the Court of Chancery for the State of New York, made on the — day of —, 18—, in a certain cause therein depending, wherein L. M. is plaintiff, and N. O. defendant, the above-named A. B. was appointed Receiver of all and singular the rents, issues, and profits of the real estates in question in this cause [*if personal estate, add; —*] and of the produce, interest, and avails of the personal estate in question in this cause.

Now the condition of this obligation is such, that if the said A. B. shall well and faithfully perform the trust and office of Receiver of the estate in question in the above cause, and shall account to the Court of



Chancery for the State of New York, according to law, then this obligation to be void ; else to remain in full force and virtue.

A. B.  
C. D.

Signed, sealed, and delivered  
in the presence of G. H. and S. J.

*(e.) Another Form.*

In Chapin *v.* Mann, Suffolk Co., Mass., 1867, a Receiver's bond was given to "G. C. W., Clerk of the Supreme Judicial Court," in the common form of obligation, conditioned substantially as follows : Whereas, J. B. D. has this day been appointed by decree of the Supreme Judicial Court as Receiver of the property and effects of the late partnership existing between J. L. C. and A. M., having their usual place of business in Boston, and carried on under the name and style of " Dr. C. A. S. & Co. ;"

\* Now if the said J. B. D. shall well and truly do and per- \* 2343  
form all such things as are ordered to be done by him in said  
decree appointing him Receiver, and shall duly account for and pay  
over what he shall so receive, as hereafter said Court shall direct, then  
this obligation shall be void and of no effect ; otherwise shall remain in  
full force and virtue.

J. B. D. (L. s.)  
B. F. B. (L. s.)  
W. D. M. (L. s.)  
H. R. (L. s.)

October 24, 1867.

I hereby approve this bond.

G. C. W., *Clerk.*

*(f.) Recognizance of a Receiver of a Banking Corporation.*

Commonwealth of Massachusetts.

Suffolk, ss. }  
In Equity, } Supreme Judicial Court.

Commonwealth *v.* Newburyport Bank.

Be it remembered, that on this — day of —, A. D. eighteen hundred and —, before me, G. C. W., Clerk of said Court, duly authorized by a decree of said Court [made in said cause], personally appeared H. W. K., of N., in the County of —, Esquire, as principal, and B. W., of —, in said County of S., gentleman, as surety, and acknowledged themselves to be jointly and severally indebted to the Commonwealth of Massachusetts, in the sum of —, to be levied upon their goods or chattels, lands or tenements, and in want thereof upon their bodies, to the use of the said Commonwealth, if default be made in the performance of the condition hereunder written.

The condition of this recognizance is, that whereas the above-named H. W. K. has been duly appointed by a decree of said Court, passed on the — day of —, current, a Receiver of the property and effects of

the Newburyport Bank, a Banking Corporation in the town of N., aforesaid, as by said decree on file appears;

Now, therefore, if the above bounden H. W. K., shall faithfully perform all his duties as Receiver of said Banking Corporation [under said last-named decree, and shall duly account for whatever may come to his hands in his said capacity, and pay over the same or the proceeds thereof, as he may hereafter be directed by said Court], then the above written recognizance to be void: otherwise to abide in full force, power, and virtue.

G. C. W., *Clerk.*

\* 2344 \* (g.) *Receiver to give sheriff statement of property he claims.*

Let P., the Receiver appointed in this cause, within (seven) days after notice hereof, deliver to the sheriff of S. a statement in writing, specifying what part of the goods and chattels now in the possession of the said sheriff the said Receiver claims, as the property of K., the testator in, &c., named; And let the sheriff withdraw from the possession of such parts of said goods and chattels as the Receiver shall so specify. (1856) 2 Seton Dec. (Eng. ed. 1862) 1002.

(h.) *Separate accounts of rents and personalty; investment.*

And let such Receiver keep separate accounts of the said rents and profits, and of the said personal estate, and from time to time pass his accounts and pay the respective balances which shall be certified to be due from him into the, &c., to separate accounts to be entitled, &c.; And let such balances when, &c., be laid out, &c. 2 Seton Dec. (Eng. ed. 1862) 1002.

(i.) *Receiver continued at the hearing.*

Let the Receiver appointed in this cause pursuant to [*or, by*] the order dated, &c., be continued; And let him [keep down the interest on the mortgages therein mentioned and] pass his accounts and pay his balances as thereby directed. (1848) 2 Seton Dec. (Eng. ed. 1862) 1003.

## 2. MANAGEMENT OF ESTATES.

*Receiver to repair buildings.*

Let the works and repairs on the farm in the occupation of, &c., at, &c., mentioned in the affidavit of, &c., be done and executed by, &c., according to the specifications and estimates contained in the exhibits K. and L. in the said affidavit referred to; And let the said works and repairs be done and executed under the direction and superintendence of the defendant T., the Receiver of the rents and profits of the trust estates in question in these causes; And let, upon the said works and repairs being certified to have been properly executed, according to the said several specifications and estimates, the said receiver be at liberty

to pay to the said, &c., the sum of \$—, and be allowed the same on passing his accounts; And let timber of the value of \$— be taken off the said trust estates for the said repairs and works. *Thellusson v. Woodford* (1855), 2 Seton Dec. (Eng. ed. 1862) 1014.

\* 3. ACCOUNT AND PAYMENT.

\* 2345

(a.) *Order for Receiver to bring in accounts.*

“Let C., the Receiver appointed in these causes, on or before the — day of — [or, within — days after service of this order], leave in the Chambers of the Judge his (5th) account as such Receiver, pursuant to the order dated, &c., and on or before the — day of —, leave in said Chambers his (6th) account as such Receiver.” Receiver to pay costs of application. *Cave v. Cave*, (1860) 2 Seton Dec. (Eng. ed. 1862) 1018.

(b.) *Putting recognizance in suit.*

Let the plaintiffs [and the defendant C., the trustees of the will of E. P., the testator in, &c.] be at liberty to put in suit the recognizance entered into by B., the late Receiver in these causes, together with D. and E., his sureties, dated, &c. 2 Seton Dec. (Eng. ed. 1862) 1019.

4. DISCHARGE OF RECEIVER.

*Discharge and payment.*

Let A., the Receiver of, &c., appointed by the order dated, &c., be discharged; And let him pass his final account, and pay the balance which shall be certified to be due from him into the, &c., to the credit of, &c., [or, to (the plaintiff) B., or, &c.]; And thereupon, let the recognizance, dated, &c., entered into by the said A., together with C. and D., his sureties, be vacated.

5. RECEIVER AND MANAGER OF TESTATOR'S BUSINESS.

“Let a proper person be appointed to collect, get in, and receive the debts now due and outstanding, belonging to the trade or business in the pleadings mentioned, carried on by the testator, and since by the defendants M. & C., and by the defendant M., and out of the first moneys to be received to pay the debts due from the said trade or business, and to manage the same, until the sale thereof.” — “And let the plaintiffs and defendants deliver over to such person all the stock in trade, goods, effects, books, and accounts belonging to the said business.” — Directions to pass accounts and pay in balances. 2 Seton Dec. (Eng. ed. 1862) 1024.

\* 6. RECEIVER TO PAY OFF OR KEEP DOWN CHARGES. \* 2346

*Annuities.*

Let the Receiver appointed, &c., out of the rents and profits of the real estates of H., the testator in, &c., pay to the annuitants in his will

named the arrears now due (to them in respect) of their several annuities, as the same shall from time to time become due, at the times and in the manner in the said will mentioned; such payments to be allowed in his accounts. *Hopkins v. Walker* (1853), 2 Seton Dec. (Eng. ed. 1862) 1026.

## 7. RECEIVER OF PARTNERSHIP BUSINESS AND PREMISES.

### (a.) *Receiver and manager of partnership business.*

"Let a proper person or persons be appointed, either jointly or separately, to collect, get in, and receive the debts now due and outstanding, and other assets, property, or effects, belonging to the said partnership business of, &c., at, &c., and out of the first moneys to be received to pay the debts due from the said business, and to manage the same, so far as relates to any contract subsisting on the — day of —, and either of the parties is to be at liberty to propose himself as such receiver and manager to act without salary; And let the plaintiff and defendant deliver over to the person or persons so to be appointed all the stock in trade and effects of the said partnership, and also all securities in their, or either of their, hands, for such outstanding partnership estate, together with all books and papers relating thereto." — Directions that all the partnership property and effects, other than stock in trade, and the good-will of the partnership, be sold, either as a going concern, or otherwise as the Court shall direct, and either of the parties, not having the conduct of such sale, to be at liberty to bid; Liberty to apply in Chambers as to the payment of any liabilities of the partnership prior to the appointment of such Receiver and manager, or Receivers and managers; usual directions to pass accounts, and pay balances into, &c., to be laid out. *Pilling v. Pilling* (1861), 2 Seton Dec. (Eng. ed. 1862) 1031.

\* 2347 \* (b.) *The like, pending petition to annul proceedings under one petition in Insolvency, and to obtain an order to issue a warrant on another.*

E—, ss.

S. J. C.

G. T. L. et al. Pet. v. G. F. C. et al. Resp.

And now on this — day of —, after hearing the parties by their respective counsel, it is ordered, adjudged, and decreed that A. H., Esquire, of S., in the County of E., be, and he hereby is, appointed Receiver of the estates, property, moneys, debts, and effects, real and personal, of the firm of W. & L., and of the estates, property, money, debts, and effects, real and personal, of the firm of B. P. W. & Co., and of the estates, property, moneys, debts, and effects, real and personal, of B. P. W., and of the estates, property, moneys, debts, and effects, real and personal, of said G. T. L., to take charge of all and singular thereof, and collect all outstanding debts due, owing, or payable to either of said firms, or to said B. P. W., or to said G. T. L., with full power to compound for any of said debts, taking less for the whole,

whenever said Receiver shall think it best for the interest of all concerned so to do, and upon such terms as said Receiver shall judge expedient, all such compromises to be sanctioned by this Court before the same are carried into effect with power to prosecute and defend in the name of either of said firms, or of said B. P. W., or of said G. T. L., or in his own name as Receiver, all such suits as he shall deem expedient; also to sell and dispose of for cash or on credit, at public auction or at private sale, all or any of the estates, debts, and effects aforesaid, except moneys, if and whenever and upon such terms as said Receiver shall think for the interest of all concerned; also with full power to submit to arbitration any dispute or controversy in regard to any debt due or claimed to be due to said firms or either of them, or to said B. P. W., or G. T. L.; also with full power to redeem from any mortgage, pledge, lien, or claim thereon any of the estates, property, debts, or effects aforesaid, and to use for that purpose any funds in his hands that may belong to the firm or separate estate as the case may be, that such incumbered property may belong to.

And said Receiver has liberty to employ all such servants and agents under him, whether members of said firm or otherwise, as he shall deem useful and expedient in the getting in, sale, collection, manufacture, or disposal of said property, estate, debts, and effects, and to pay them a proper and reasonable compensation for their services out of the proceeds thereof. And said Receiver is also empowered, if he shall think it expedient so to do, to finish and complete the manufacture of any part or portion of the property aforesaid that may be partially manufactured or in process of manufacture, and to defray the cost and expenses \* thereof out of the proceeds of the property, estate \* 2348 debts, and effects of the firm or individual to whom such partially manufactured property or property in process of manufacture belongs.

And the said B. P. W. and G. T. L. and W. R. W. and P. E. D., the Messenger, are hereby required and ordered to deliver to said Receiver, all and singular, the stock, merchandise, moneys, property, debts, and effects of said firms, or either of them, or of said W. B. P. or of said G. T. L., in the hands, possession, or control of them, or either of them, with all the books, deeds, writings, documents, vouchers, and papers relating thereto, or relating to any part or portion thereof; and each of them, the said B. P. W., G. T. L., W. R. W., and D., are restrained and enjoined from collecting any of the debts aforesaid, and from using, spending, injuring, conveying away, transferring, selling, or in any manner disposing of or incumbering any of the estates, property, debts, effects, books, deeds, writings, documents, vouchers, or papers aforesaid, except to deliver them into the hands of said Receiver. And said W. B. P. and G. T. L. and W. R. W., and each of them, are hereby required to make, execute, acknowledge, and deliver to said Receiver any and all conveyances, instruments, and transfers in writing, if any, which said Receiver shall reasonably be advised to be necessary or proper to more effectually vest in him any part of the estates, property, debts, and effects aforesaid. And said Receiver shall be entitled to retain out of the proceeds of said estates, property, debts, and effects

aforesaid a reasonable compensation, to be determined by the Court for his services and expenses.

And said Receiver is required to hold all the estates, property, debts, and effects aforesaid, or the proceeds thereof, except such as shall have been disposed of pursuant to this decree, also all the books, writings, documents, vouchers, and papers aforesaid, subject to the order and direction of the Court. And said Receiver is required to file in the office of said clerk, within three months from the date of this decree, under oath, a true account of all his receipts and disbursements as such Receiver.

And either of the parties or said Receiver may apply from time to time to the Court for further direction as occasion may require. It is also ordered that a writ of injunction issue against said B. P. W., G. T. L., W. R. W., and D., conformably to this decree, and that said W. R. W. be by said injunction also restrained and enjoined from using, spending, injuring, conveying away, transferring, selling, or in any manner disposing of or incumbering any part of his separate estate, property, debts, or effects, real or personal, or any of the books, deeds, writings, documents, vouchers, or papers relating thereto, until the further order of this Court, and except as hereafter directed or allowed by this Court.

\* 2349 \* (c.) *Order of Court on request by Receiver for authority to compromise notes and accounts.*

At Chambers in B., June 17, 1862.

On the foregoing petition it is ordered, that free authority be given to the Receiver in the above-entitled case to compromise and compound, and take part in payment, of all such notes, debts, and demands, due to the parties, whose estate and property are now in his hands as Receiver, on such terms and conditions as he may think expedient; the said Receiver keeping an account of the notes, debts, and demands, which may be compromised and compounded by him under this order, and making report thereof to this Court.

It is also ordered that said Receiver pay to the messenger, appointed under the insolvent proceedings, such sum as may be due to him, for services and expenses; the same to be paid out of any funds in his hands belonging to said estate.

G. T. B.,  
Ch. Jus. Sup. J. C.

(d.) *Acceptance and approval of Receiver's account.*

E—, ss. }  
S. J. C. }

G. T. L. & als., Pet. v. G. F. C. & als., Resp.

On the account rendered in the above cause by A. H., Esquire, the Receiver appointed therein, it is ordered, adjudged, and decreed by the Court, that said account be, and the same is, hereby accepted and

approved, and that said A. H. be allowed for his services as such Receiver the sum of \$—— out of the moneys in his hands as such Receiver, and that all the goods, wares, merchandise, *choses in action*, property, estates, effects, moneys, deeds, documents, vouchers, writings, papers, and books of account in his hands or possession, or under his control, as such Receiver, after the retention by him out of said moneys of the sum so allowed him, be delivered and passed over by him into the hands and possession of such person or persons as shall be appointed assignees in insolvency of the joint and separate estates of B. P. W., G. T. L., and W. R. W., copartners under the firm of W. & L., and said Receiver is hereby ordered and directed to deliver and pass over the same accordingly, and make return thereof to this Court within ninety days from the date hereof. *Lancaster v. Choate*, Essex Co., Mass., 1863, 5 Allen, 530.

By the Court.

Attest, A. H.

* D. S. v. The Columbia Ins. Co. and H. E.	}	S. J. C. S——, ss. March T., 1857.
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\* 2350

In Equity.

(e.) *Order for the appointment of Receiver, in a suit by a creditor against a foreign insurance company and their agent in Massachusetts having in his hands property which could not be come at to be attached, under the statute of Massachusetts.*

Whereas it has been made to appear to this Court by the report of G. S. H., to whom this cause was referred as Master, that there are now in the hands and possession of H. E. one of said respondent's promissory notes to the amount of \$——, accounts to the amount of \$——, and money to the amount of \$——, belonging to the said Columbia Insurance Company, over and above all claims or liens which the said H. E. has against said company or their property in his hands. And whereas it has been made to appear that it is necessary that some fit and proper person should be appointed to receive and hold said promissory notes, accounts, and money, until the further order of this Court, with authority also to collect and compromise said notes and accounts, according to his best judgment and discretion;

It is ordered that E. M. be, and hereby is, appointed a Receiver, to receive and hold said promissory notes, accounts, and money; and the said E. M. is hereby authorized to collect said notes and accounts, and to receive less than the full amounts due thereon, whenever the full amounts in his best judgment are not collectible, subject in all cases to the approval of the Court; and to surrender up said notes, and to give receipts for the payment of said accounts upon the payment thereof, in whole or in part as aforesaid.

And the said E. M. is to retain said funds, promissory notes, and accounts, or the proceeds thereof, and to account for and pay over the same as this Court shall hereafter order and direct.

And the said H. E. is hereby ordered and directed forthwith to deliver and pay to said E. M., Receiver as aforesaid, the promissory notes, accounts, and funds aforesaid, and all books and papers in his possession or under his control relating thereto.

By order of G. T. B., Esq., one of the  
Justices of said S. J. C.

(Signed)

G. C. W., *Clerk.*

Oct. 24, 1857.

\* 2351 \* D. S.

*v.*  
The Columbia Ins. Co.  
and  
H. E.

} Sup. J. Court,  
March T., 1857.

In Equity.

(*f.*) *Decree discharging said H. E., in the above case, upon his paying the amount reported in his hands to the Receiver.*

Whereas this cause was referred on the twenty-seventh day of April, A. D. 1857, to G. S. H., Esq., as Master, to ascertain and report what amount of funds, promissory notes, or other *choses in action* belonging to said Columbia Insurance Company were in the hands of H. E., the other respondent, and what liens, if any, the said H. E. had upon the same, as will more fully appear by a reference to said order; and whereas said G. S. H., in pursuance of said order, has now made his report to this Court, wherein and whereby it appears that there are now in the hands of said H. E. promissory notes belonging to said Columbia Insurance Company to the amount of \$—, accounts to the amount of \$—, and cash to the amount of \$—, and that the said H. E. has a lien thereon for the following claims, namely: [*stating them*].

Making in all the sum of \$—.

Now it is hereby ordered and decreed, that the said H. E. deliver to E. M., Esq., who has been appointed Receiver in this case, the said promissory notes and accounts, and all books, papers, and vouchers relating to the same, and also that the said H. E. pay to said Receiver the sum of \$—, being the balance of cash in his hands, after deducting the amount of his claims and liens as aforesaid; and also if the said H. E. is not held to pay the two said notes of \$120 and \$90, as aforesaid, then that said H. E. pay to said Receiver the additional sum of two hundred and ten dollars (\$210).

And after compliance by the said H. E. with each and every one of the terms of this order, it is ordered and decreed that the said H. E. be forever discharged from all liability to account to the plaintiff, or to said Columbia Insurance Company, or to any other person or corpora-



tion, for said funds, promissory notes, or accounts, as aforesaid; and that as against the said H. E. this bill be dismissed.

By order of G. T. B., Esq.,

One of the Justices, &c.,

G. C. W., Clerk.

Oct. 24, 1857.

\* (g.) *Order of reference to a Master to report the amount to be \* 2352  
allowed as compensation to Receiver, and the balance  
remaining in his hands.*

It is ordered that this cause be referred to G. S. H., Esq., as Master, to examine the Report of E. M., Esq., Receiver, and to report what sum shall be allowed the Receiver for his services in said case, and what balance remains in his hands, subject to the further order of this Court in favor of the creditors of said Columbia Insurance Company. And the said Master is ordered to give D. S., the plaintiff, as well as said Receiver, notice of the time and place of the hearing before him.

By order of C. A. D., Esq.,

One of the Justices, &c.,

G. C. W., Clerk.

Jan. 23, 1861.

(h.) *Order on Receiver to pay out of funds in his hands the taxable costs  
of suit, and the balance to the plaintiff on account of his claim.*

This cause having been referred to G. S. H., Esq., as Master, to examine the accounts of E. M., Esq., the Receiver, and to report what balance remains in his hands subject to the final decree of the Court, and it now appearing from said report that there is in the hands of said Receiver the sum of \$——, subject to the order of this Court, and also that there are two outstanding claims in favor of said Receiver and uncollected, one of which is against one T. H. H., and the other against one J. H. P.; it is hereby ordered and decreed, that the Receiver pay from the funds in his hands the taxable costs of this case, taxed by the Court at one hundred and thirty-three dollars and  $\frac{6}{10}$  (\$133.46), and that the balance remaining thereafter, namely, the sum of \$——, be paid by him to D. S., the plaintiff, on account of his claim against the said Columbia Insurance Company, on the said D. S. filing a receipt therefor with the record in this case; and that this shall stand as the final decree in this case, unless the said Receiver shall hereafter receive anything on account of the claims aforesaid, in which case he shall be at liberty to apply to the Court for further directions.

By the Court,

May 20, 1861.

G. C. W., Clerk.

\* 2353

## \* 8. RECEIVER AND MANAGER ABROAD.

*Receiver of property in Italy, with leave to appoint agent there, to litigate rights.*

Let B. M., of, &c., be appointed to collect and get in the outstanding personal estate and effects of the testator, and to receive the rents and profits of his real estate in Italy, and any money that may arise from the sale of his real estate in Italy. — “And let such Receiver, with the approbation of, &c., if expedient, appoint a proper person as his agent, living at or near L., or elsewhere in Italy, to collect the said rents and profits, and to receive and get in the (personal) estate and effects of the testator, and to see the same properly secured and transmitted to, &c., to be disposed of as this Court shall direct, and, if necessary, to continue the suit now instituted, and to litigate and contest any other suit which may arise (concerning), or have relation to, the testator's estate in Italy; And let, if necessary, a proper instrument be executed by the defendant, to such person so to be appointed, for the purposes above mentioned, such instrument to be approved of by — Judge” [*or, Court*]. — Plaintiff and defendant to deliver over to Receiver all securities, books, and papers; and he to pass accounts, and pay in balances. *Hinton v. Galli* (1854), 2 Seton Dec. (Eng. ed. 1862) 1039.

## SECTION V.

## PRODUCTION AND DISCOVERY.

## 1. PRODUCTION AND INSPECTION OF DOCUMENTS.

*(a.) To deposit in Court documents admitted by answer.*

It is ordered that the defendant A., within (seven) days after service of this order, produce and leave with the clerk, &c., the several documents mentioned in the answer of the said defendant filed the — day of —, and in the — schedule thereto, and admitted to be in his possession or power, with liberty for the plaintiff, his solicitors and agents, to inspect and peruse the same, and take copies and abstracts thereof, and extracts therefrom, as he shall be advised, at his expense. And the clerk, &c., is to produce the same upon any examination of witnesses in this cause, and at the hearing thereof, as the plaintiff shall require.

\* 2354 \* *(b.) For inspection thereof out of Court (with leave to seal up).*

It is ordered that the plaintiff, his solicitors and agents, be at liberty at all seasonable times, upon giving reasonable notice, to inspect at the office of — [*usually the defendant's solicitors*], situate at —, the several documents mentioned in the answer of the defendant A., filed the — day of —, and in the schedule thereto, and admitted to be in his possession or power, and to take copies and abstracts thereof,

and extracts therefrom, as he shall be advised, at his expense; [but previously to the said inspection, the said defendant is to be at liberty to seal up such parts of the said documents as according to an affidavit to be made by him do not relate to the matters in question in this cause]; And it is ordered that the said defendant produce the said document upon any examination of witnesses in this cause, and at the hearing thereof, as the plaintiff shall require. 2 Seton Dec. (Eng. ed. 1862) 1040. [See *Reed v. Stevenson*, 6 W. N. 163.]

## 2. DELIVERY OUT OF DOCUMENTS.

### (a.) *To a party or purchaser.*

It is ordered that (such of) the several documents deposited by, &c., with the clerk, &c., pursuant to the order dated, &c. (as relate to, &c., or are mentioned in the schedule hereto), be delivered out to the plaintiff [or, defendant] A. [or to B., the purchaser of the (estate comprised in lot —, part of the) real estates of C., the testator in the pleadings named].

### (b.) *To a party's solicitor to be produced in evidence.*

(*By consent.*) It is ordered that the documents deposited by the defendants with the, &c., be delivered out to Mr. —, the defendant's solicitor, for the purpose of producing the same before the (special) Examiner appointed to examine witnesses in this cause in the country, the said Mr. — undertaking to re-deposit the same within a week after the examination is closed. Plaintiff to be at liberty to inspect the documents meanwhile. 2 Seton Dec. (Eng. ed. 1862) 1062.

## \* SECTION VI.

## \* 2355

### DECREES PRO CONFESSO.

### (a.) *Where defendant does not appear at the hearing.*

This cause coming on, &c., in the presence of counsel for the plaintiff [if there are defendants who appear, add and for the defendants A. and B.]; And whereas, &c. [recite shortly the proceedings for obtaining the appearance of the defendant]: and upon reading the plaintiff's bill duly, &c.; and upon hearing what was alleged by the counsel for the plaintiff [and for the defendants A. and B.], this Court, &c., doth order that the plaintiff's bill be taken *pro confesso* against the said defendant C. And doth order and decree, &c.

### (b.) *Another form.*

This cause coming on to be heard in the presence of counsel for the plaintiff, and it appearing to the Court that the *subpœna* issued in the cause was duly served upon the defendant, and that the time for appearance by the defendant has long since expired and no appearance has

been entered, on motion of the counsel for the plaintiff, it is ordered that the bill of complaint in the cause be and the same is hereby taken as confessed by the defendant; and the Court doth thereupon further order [*or declare*], &c.

(c.) *Where defendant appears and waives objections.*

This cause, &c.; And the defendant C. now appearing by counsel, and waiving all objections to the order, dated the — day of — [*preliminary order*], and praying to be heard to argue the case upon the merits stated in the bill; This Court, &c. 2 Seton Dec. (Eng. ed. 1862) 1128.

## SECTION VII.

### 1. DISMISSAL AT THE HEARING.

(a.) *Dismissal of bill.*

This cause coming on, &c., this Court doth order, that the plaintiff's bill do stand dismissed out of this Court [*if there are other defendants who do not appear, or if dismissed against one of several defendants, as against the defendant B.*], with costs to be paid by the plaintiff A. to the said defendant B.; And to be taxed by the, &c. [*in case the parties differ*].

\* 2356

(b.) *As to part of the bill.*

This Court doth order that so much of the plaintiff's bill as seeks, &c., do stand dismissed out of this Court, with costs, &c.; And as to the rest of the relief sought by the plaintiff's bill, &c.; It is ordered, &c.

(c.) *With costs as to some defendants, and without costs as to others.*

This Court doth order that the plaintiffs' bill stand dismissed out of this Court, without costs, as against the defendants A., B., &c., and with costs as against the defendants D., E., &c., such costs to be taxed, &c., and paid by the plaintiffs [*names*] to the said defendants D., E., &c.

(d.) *Where plaintiff does not appear.*

This cause coming on this day to be heard before this Court, &c. [*if set down by defendant, at the request of the defendant*], in the presence of counsel learned for the defendant, no one attending for the plaintiff, although the plaintiff has been served [*or, although the plaintiff has been duly served*] with a *subpoena* to hear judgment in this cause [*at the request of the defendant*], as by affidavit [*now produced*] appears, and upon hearing what was alleged by the counsel for the defendant, and upon reading the said affidavit, &c.; This court doth order, that the plaintiff's bill do stand dismissed out of this Court with costs, &c.

(e.) *Dismissal with costs, reasons stated.*<sup>1</sup>

The bill charging the defendants with combining and confederating to wrong and defraud the plaintiffs, as assignees of the estate of the said Joseph Winsor, by making unjust claims against said insolvent, and obtaining payments by preferences, contrary to the provisions of the insolvent laws of Massachusetts, all the material allegations thereof being denied, the evidence of the respective parties being duly taken and published, and the cause brought to hearing, and having been fully argued by counsel; it is considered, adjudged, and decreed by the Court here, that the claims and demands set up by the defendants in their respective answers, as due from said insolvent, were just and true claims and demands, and that the payment thereof at the times and in the manner set forth in said answers, and as proved, was not made in violation of the said insolvent laws; and thereupon the said bill, after full hearing upon the merits of the cause, is adjudged and decreed by the Court to be dismissed with costs for the defendants. *Bigelow v. Winsor*, 1 Gray, 300.

(f.) *Dismissal without prejudice; reasons stated.*

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, \* adjudged, and decreed by the Court, that the plaintiff is enti- \* 2357 tled to no specific lien or security upon either of the vessels mentioned in the plaintiff's bill, and has no equity to be relieved in respect thereof, and that his bill be dismissed with costs to the defendants, without prejudice to his right to come in and receive a dividend of the said R.'s estate, in common with the other creditors of the said estate. [*Hunt v. Rousmanier*, 3 Mason, 307.]

(g.) *Dismissal on case agreed.*

"This cause having been submitted upon a case agreed by the parties, and upon the arguments of counsel thereon, as well on the part of the defendants as of the plaintiffs, and due deliberation thereupon had, and it appearing that the plaintiffs are not entitled to the personal estate, either of the late Sir William Pulteney, or of the late Countess of Bath, in the pleadings mentioned, in exoneration of the land from the mortgage debt in question; It is thereupon ordered, &c., that the plaintiffs' bill be dismissed, and that no costs be charged by either party as against the other."

(h.) *Dismissal; reasons stated; costs; without prejudice to right to bring another suit.*

"It is declared, that nothing appears to impeach the consideration, or validity of the judgment in the pleadings mentioned, in favor of the defendant H., nor his right and title to the proceeds of the per-

<sup>1</sup> See form of such decree in *Troy Iron and Nail Factory v. Corning*, 1 Blatch. 474, 475.

sonal estate of the G. Manuf. Co., sold under his execution, and paid to him, nor his right and title to collect the residue of the judgment by the means provided by Law; and that the G. Manuf. Co., as well as other debtors, were authorized to give preferences among creditors for a debt justly due. It is therefore ordered, &c., that the bill as to the defendant H. be dismissed, with costs. And it is further declared, that the plaintiffs were not entitled, at the time of filing their bill, to question, in this Court, the dispositions of their personal property, inasmuch as, at the time of filing their bill, they had not acquired a lien at Law upon the real estate, as judgment creditors, nor have they, as yet, acquired, as execution creditors, a legal preference to the personal property, by means of an execution duly issued and levied or returned, nor shown that they cannot obtain satisfaction of their debt by having tried in vain the ordinary process of such execution at Law. And it is further declared, that though the defendants, who are trustees of the said company, and purchased in the personal property of the said company, under the execution of the defendant H., may be liable to have that property redeemed and resold, for the benefit of the creditors seeking the same, after deducting the price they gave, and the just expenses incurred thereon; yet none but an execution creditor

\* 2358 at Law \* is entitled to ask for such assistance from this Court in respect to the personal estate. It is thereupon further ordered, &c., that the bill as to all the other defendants who have answered be dismissed without costs, and without prejudice to the right of the plaintiffs to bring a new suit for the purpose aforesaid in the proper character of judgment execution creditors."

(i.) *Dismissal framed to prevent prejudice.*

Supreme Court of United States.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of —, and was argued by counsel; on consideration whereof, this Court is of opinion that the decree of the Circuit Court ought to have shown that the bill was dismissed because the deed therein mentioned, being void at Law for matter apparent on its face, the plaintiff had not shown any circumstances which disclosed a case proper for the interference of a Court of Equity to relieve against such void deed. And this Court is further of opinion, that so much of the said decree as dismisses the bill with costs is erroneous, and ought to be reversed. This Court doth therefore reverse and annul the said decree, and direct that the case be remanded to the said Circuit Court with directions to modify the same according to the principles of this decree. 6 Peters, U. S. 100, 101.

SECTION VIII.

1. LEAVE TO ENTER DECREE NUNC PRO TUNC.

Upon motion, &c., who alleged that the time for entering the decree [or order] made in this cause, and dated on the — day of —, expired

on the — day of —; This Court doth order, that the said decree [*or order*] be entered *nunc pro tunc*.

## 2. REVIVOR AND SUPPLEMENT.

### (a.) *Order to revive.* [*English Form.*]

Upon motion, &c., by counsel for the plaintiff, who alleged [*state the last material proceeding in the suit, and the subsequent events in concise form*], This Court doth order, that this suit, which has become abated in manner aforesaid, stand revived, and be in the same plight and condition as the same was in at time of the said abatement.

### \* (b.) *Order to revive, on marriage of feme sole plaintiff.*<sup>1</sup> \* 2359

*If no next friend required*, It is ordered that the cause stand revived, at the suit of the said A. [*husband*], and the above-named plaintiff, now the wife of the said A., against all the defendants, and be in the same plight, &c. *If a next friend required*, It is ordered that this cause stand revived, at the suit of the above-named plaintiff, now the wife of B., by C., of, &c., her next friend, against all the defendants, and against the said B., and be in the same plight, &c.

### (c.) *Order to carry on suit against assignees of bankrupt or insolvent defendant.*

It is ordered that this suit be carried on and prosecuted by the plaintiff against the said M., &c., as such assignees as aforesaid, as if the said defendant had not become bankrupt, &c. 2 Seton Dec. (Eng. ed. 1862) 1165.

### (d.) *Same; by committee [or guardian] of plaintiff, a lunatic, before decree.*

It is ordered that A., the committee [*or guardian*] of the person and estate of the lunatic plaintiff B., be at liberty to carry on and prosecute this suit against the defendants C., &c., in the same manner as the plaintiff B. might have done if he had not so become a lunatic.

<sup>1</sup> Griffin v. Morgan, L. R. 4 Ch. 351, was a suit for administration, instituted in the name of three infants by their next friend. After this, one of them, a female, married before decree. The next friend and the other parties to the suit were unaware of the marriage, and she and her husband were unaware of the existence of the suit, until after a decree had been made. Vice-Chancellor Stuart declined to make an order of revivor, considering that the defect could not be remedied without a supplemental bill; but, the defendants consenting, an order of revivor was made by the Lords Justices, as follows: "The said T. H. [*the husband*], by his counsel, appearing, and submitting to be bound by the said decree, and the defendants, by their counsel, consenting,

order that this cause do stand revived at the suit of the said J. H. [*the wife*] and the other plaintiffs, all by the said J. G., their next friend, against the defendants and the said T. H., and that the said decree, and all proceedings thereunder, be carried on and prosecuted, between the plaintiffs and the defendants and the said T. H., and that the plaintiffs do have the same benefit of the said decree and of the proceedings thereunder against the defendants and the said T. H., as if, prior to the date of the said decree, an order to revive this cause had been duly obtained and served, and the said T. H. had been made a defendant, and had appeared on the hearing of the motion on which such decree was made."

## 3. DECREES, ON SUPPLEMENTAL BILL, TO CARRY ON PROCEEDINGS.

*(a.) Decree to carry on proceedings.*

It is ordered that the decree [*or order*], dated, &c., made in the original suit, wherein A. was plaintiff, and C. and D. were defendants, be carried into execution, and the accounts and inquiries, and \* 2360 several \* other matters thereby directed [and the several proceedings thereunder], be carried on and prosecuted between the parties to this suit, in like manner as thereby directed between the parties to the said original cause; And it is ordered that the further consideration of this cause be adjourned, in like manner as the further consideration of the said original cause was adjourned by the said decree [*or order*].

*(b.) Same; on supplemental bill in the nature of bill of revivor, though original decree was made after suit abated.*

This Court doth declare, that the plaintiffs are entitled to have the benefit of the proceedings which have been had in the original suit of *H. v. P.*, and others, under the decree made in that suit, dated, &c., against the defendants in this suit, who are the executors of R., named as a defendant in the original suit, who died previously to the date of the said decree, as if previously to such decree (a bill had been filed against the executors of the said R., and) an order to revive the said suit had been duly obtained; And doth decree that the said suit and proceedings be carried on accordingly; And adjourn further consideration, &c., in like manner as, &c. 2 Seton Dec. (Eng. ed. 1862) 1175.

## 4. DISPENSING WITH, OR APPOINTING, A REPRESENTATIVE.

[Under 15 & 16 V. c. 86, § 44.]

*(a.) Order to carry on proceedings without a representative.*

Upon motion, &c., of counsel for all parties, and upon reading the order dated, &c., and an affidavit of, &c., whereby it appears that J. and H., two of the grandchildren of G., the testator in the (bill) named, are dead, and that there is no legal personal representative to either of them, this Court doth order, that the proceedings in this cause, and the inquiries and several other matters directed by the order dated, &c., be carried on and prosecuted, notwithstanding the absence of any person representing the respective estates of the said J. and H. *Gladwin v. Gladwin* (1853), 2 Seton Dec. (Eng. ed. 1862) 1178.

*(b.) Order appointing plaintiff to represent deceased plaintiffs.*

Upon motion, &c., of counsel for plaintiffs, and upon reading an affidavit of, &c., this Court doth order, that the plaintiff W. be appointed to represent the estates of the plaintiffs G. E., &c., respectively deceased, for the purposes of this suit. *Vince v. Walsh* (1853), 2 Seton Dec. (Eng. ed. 1862) 1178.



\* 5. SALES UNDER DECREE OR ORDER.

(a.) *Order of sale under Insolvent Laws of Massachusetts ; application of proceeds to incumbrances ; balance of debts, if any, to be proved ; surplus of proceeds, if any, to await further order.*

It is ordered, that the assignees of the said A. B. do, and they are hereby directed to sell the property and estate in the petition of C. D., and in the petition of E. F., mentioned and described, at public auction, at such time and places on or before the first day of December, 1849, as they may think most beneficial to the parties interested therein, first giving twenty days' notice of such sale, by publishing, &c., and the said D. & F., are required and enjoined to join with said assignees in a conveyance of said estate, so as to convey all their respective rights to, and interests therein ; Also, that the proceeds thereof be applied, in the first instance, to the extinguishment of said C. D.'s debt in his said petition mentioned, so far as necessary therefor ; and that said C. D. be allowed to prove, for such balance, if any, as may remain unpaid ; but if a balance [surplus] of said proceeds remain, after payment of the amount of said C. D.'s claim, it is ordered, that said balance [surplus] be applied to the payment and extinguishment of the debt in favor of said E. F., the same being first to be proved and established, and that said E. F. be allowed to prove against said insolvent estate such balance, if any, of his debt, as may remain unpaid ; But if any surplus remain of said proceeds, after making said payments, the same to be subject to such order in relation thereto as may hereafter be made. *Hunnewell v. Goodrich*, 3 Cush. 471, 472.

(b.) *Order to pay off legal mortgagees from fund in Court, on their conveying.*

It is ordered, that, upon due execution by M. and S. of the respective conveyances to H. and L. of the real estate comprised in lots 1 and 2 [whereof the said H. and L. have been certified to be the purchasers by, &c., dated, &c., and which are] now in mortgage to the said M. and S., such execution to be verified by affidavit, &c., out of the \$——, the aggregate amount of the purchase-moneys for the said lots, and being part of the \$—— cash in the, &c., to the credit of this cause, the sum of \$—— appearing by the affidavit of, &c., to be due to the said M. S. for principal and interest on the security of the said real estate, and also subsequent interest on \$——, part thereof, at the rate, &c., from, &c., to the day of payment [the amount of such subsequent interest, and the total amount of principal and interest, to be verified by affidavit], be paid to the same M. and S.—— Direction to tax their costs, and for payment thereof out of the cash in Court ; Plaintiff to pay purchaser's costs of appearance, and be allowed them in the cause ; and plaintiff's and defendant's costs to be costs in the cause. *Sutton v. Downing*, 2 Seton Dec. (Eng. ed. 1862) 1200.

\* 2362 \* (c.) *Decree for sale of real estate held as partnership property proceeds to discharge mortgages ; and residue to pay debts of copartnership and the copartnership balance to surviving partner, to whom copartnership was indebted ; different parcels sold separately ; any party to be at liberty to bid ; separate accounts to be made of the proceeds of each parcel : confirming Master's report ; letting the purchasers into possession ; order nisi as to infants.*

“And it is further considered and adjudged by the Court that the said estate near B. street, as well as said estate on C. square and said estate on C. street, ought to be sold under the direction of the Court by a Master, and the proceeds brought into Court first to apply so much thereof as are necessary to discharge the mortgages thereon, and to apply the residue thereof to the discharge of the debts of the copartnership, and the copartnership balance that may be found due to the surviving partner. And the Court doth further order and decree that it be referred to G. T. C., Esquire, one of the Masters of this Court, to cause the said parcel of real estate in C. square, and the said parcel of real estate in C. street, and the said parcel of real estate near B. street, to be separately sold with the approbation of the said Master, at such times and places as he shall think fit, to the best purchaser or purchasers that can be got for the same, to be allowed of by the said Master, wherein all proper parties are to join as the said Master shall direct. And any of the parties are to be at liberty to bid at said sales for all or any of said estates. And it appearing to the Court that the said estates in C. square, and near B. street are incumbered by mortgages or other liens, the said Master is directed to keep and state his accounts, so that it may appear by his report what are the proceeds of each of said parcels of real estate.” [*Confirming Master's Report.*] “The report of G. T. C., Esq., the Master to whom it was heretofore referred by a decree passed in this cause, to sell the three certain parcels of real estate, having come in and been filed in the clerk's office on the — day of this term, and no exception having been taken thereto ; on motion of Mr. E., the plaintiff's solicitor, it is ordered and decreed that said report do stand confirmed, and that the said M. K. be allowed as the purchaser of said parcel of real estate in C. square, and of said estate near B. street ; and said J. L. be allowed as the purchaser of said parcel of land in C. street, at the prices of said estates respectively reported by said Master as the highest bid therefor.” [*Final Decree.*] “This cause came on to be further heard at this term for directions as to the final decree, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed that the report of

G. T. C., Esq., the Master to whom it was referred to convey  
 \* 2363 the estates sold under the authority of a former \* decree in this cause, which report was filed in the clerk's office on the — day of —, do stand confirmed ; and the said M. K. be let into possession of the said estate on C. square, and the said estate near B. street ; and said J. L. be let into possession of the said estate in C. street. And it is further ordered that the said defendants H. O. H. and S. S. H. re-

spectively do, as and when they shall respectively attain the age of twenty-one years, execute, acknowledge, and deliver sufficient deeds of release of the said estates in C. square, and near B. street, to said M. K., his heirs and assigns, and of the said estate in C. street to said J. L., his heirs and assigns, unless the said H. O. H. and S. S. H., respectively, shall within six months after they shall have respectively attained said age of twenty-one years " [on being served with *subpoena* to show cause against this decree] " show unto this Court good cause to the contrary, and in the mean time it is ordered that the said purchasers of said estates, and their respective heirs and assigns, do hold and enjoy the said estates by them respectively purchased, and to them respectively conveyed by said deeds of said Master."

(d.) *Order on plaintiff to pay money; defendant to release or cancel mortgage; in default of payment by plaintiff, sale; money to be paid into Court to credit of cause.*

This Court doth order and decree, that the plaintiff shall pay to the defendant the sum of \$—, with interest from the thirteenth day of June last, within two months from the first day of March now current, less such sums as may have been paid. And upon such payment it is ordered, that the defendant cause to be cancelled or released a mortgage deed on the premises given by him to one E. B. in the pleadings mentioned. And in default of the plaintiff's paying to the defendant what shall be found due as aforesaid, it is ordered that said estate, or a sufficient part thereof, be sold under the direction of one of the Masters of the Court, to the best purchaser or purchasers that can be got for the same, to be allowed of by the said Master, wherein all proper parties are to join as the Master shall direct.

And it is ordered, that the moneys arising from said sale be paid into Court to the credit of this cause, subject to the further order of this Court. And it is ordered that the same be applied in payment of what shall be found due to the defendant for principal and interest as aforesaid. And this Court doth reserve the consideration of all further directions until after said sale and payment. And any of the parties are to be at liberty to apply to the Court as occasion may require.

By the Court,

(Signed)

G. C. W., *Clerk*.

April 7, 1847.

#### \* SECTION IX.

\* 2364

#### EXECUTION OF DECREES AND ORDERS.

(a.) *Substituted service of decree or order.*

Whereas by the decree [*or, order*] dated, &c., it was ordered [*recite so much of the decree or order as is required to be performed*]: Now upon motion, &c., who alleged [*state from affidavit to the effect*] that the plaintiff hath been unable to serve the defendant A. with the said decree [*or*

order], although due diligence hath been used for that purpose, as by the affidavit of B., filed, &c., appears; and upon reading the said decree [or order] and affidavit, This Court doth order, that service of the said decree [or order], dated, &c., upon —, at — [or, upon A. B., C. D., and E. F., members of the firm of Messrs. B., D., & F., of —, or one of them], be deemed good service on the defendant A. 2 Seton Dec. (Eng. ed. 1862) 1212.

(b.) *Order for sequestration on return of attachment.* [English.]

Whereas by the decree [or order], dated, &c., it was ordered [*recite so much of the decree or order as is required to be performed*]; Now upon motion by counsel, &c., who alleged that an attachment issued against the defendant A., for his contempt in not, &c. [*state the default in respect of which the attachment issued*] directed to the sheriff of —, and that the said sheriff hath returned, that the said defendant is a prisoner in his custody [or, *non est inventus* thereof]; and upon reading the said decree [or order], writ, and return thereon. This Court doth order that a sequestration do issue, directed to certain commissioners to be therein named, to sequester the said defendant A.'s personal estate, and the rents, profits, and issues of his real estate, until the said defendant shall [*state the act required to be done*] clear his contempt, and this Court doth make other order to the contrary. 2 Seton Dec. (Eng. ed. 1862) 1214.

(c.) *Order to turn over to prison.*

*Where party brought up on attachment, or by habeas.*

The defendant A. being this day brought to the bar of this Court by the, &c., attending this Court [or, *if brought up by habeas, say*, by virtue of a writ of *habeas corpus cum causis*, directed to the sheriff of —, or the keeper of the — prison], to answer his contempt in not, \* 2365 &c. [*state the default in respect of which the process issued*], and \* still persisting in his said contempt. It is upon motion, &c., ordered, that the said defendant A. be turned over to the, &c., prison, and do remain there until he shall, &c., [*state what he is required to do*] clear his contempt, and this Court make other order to the contrary. 2 Seton Dec. (Eng. ed. 1862) 1223.

(d.) *Order for sequestration; corporation.*

Whereas by the decree [or, order], dated, &c., it was ordered, &c. [*recite so much of the decree or order as is required to be performed, or if for non-payment of costs, recite, direction as to costs and certificate of taxation*]; Now, upon motion, &c., by counsel, &c., who alleged that a *distringas* [*if so add, and an alias and pluries distringas*] issued against the defendants [*the corporation by their corporate name*] directed to the sheriff of —, for not, &c. [*state the default in respect of which the process issues*]; that pursuant to the said decree [or, order] the said sheriff hath returned *nulla bona* thereon [or, *if the sheriff returns issues, say, the sheriff hath returned — issues thereon*]; and upon reading

the said decree [*or order*] and certificate of taxation, and the said [*corporation*] still persisting in their said contempt, this Court doth order that a commission of sequestration do issue, &c., until they shall [*state what they are required to do*] clear their contempt, and this Court make other order to the contrary; unless the said, &c., shall, &c., on notice, &c., show cause to the contrary. 2 Seton Dec. (Eng. ed. 1862) 1229.

(e.) *Writ of sequestration.*

Commonwealth [*or, State*] of, &c.

To (*Insert the names of Commissioners to whom directed*).

Greeting.

Whereas upon motion made unto us in our Court of Chancery on the — day of —, now instant [*or, last*], by counsel for the plaintiff, in a cause wherein A. B. is plaintiff, and C. D. is defendant, it was alleged that [*recite the whole of the order for sequestration; but substitute "our said Court" for "this Court," and "our said Court did order," for "this Court doth order," or "it was ordered," and the like*]; Know ye, therefore, that we, in confidence of your prudence and fidelity, have given and by these presents do give unto you, or any three or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever of the said [*insert name of contemnor*], and to collect, receive and sequester into your hands not \* only \* 2366 all the rents and profits of his said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estate whatsoever; and, therefore, we command you, any three or two of you, that you do, at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements, and real estate of the said [*contemnor*], and that you do collect, take, and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands until the said [*contemnor*] shall [*state the act to be done, as in the order*], clear his contempt, and our said Court doth make order to the contrary.

Witness —, at — the — day of — 18—.

(f.) *Enforcing return of writ.*

*Order for sheriff to return writ.*

Upon motion, &c., by counsel for the plaintiff, who alleged that a writ of attachment issued against the defendant A. for not, &c. [*state the contempt for which the writ issued*], returnable on the — day of — directed to the sheriff of —; and that the said sheriff refuses or has neglected to return the same.—this Court doth order that the said sheriff of — do forthwith make his return to the said writ of attachment.<sup>1</sup>

<sup>1</sup> Form of order *nisi* and absolute. See 2 Seton Dec. (Eng. ed. 1862) 1230.

## MISCELLANEOUS DECREES AND ORDERS.

## 1. LEAVE FOR DEFENDANT TO ENTER APPEARANCE ON RETURN INTRA JUR. AND CONSENTING TO BE BOUND.

Upon motion, &c., who alleged that the defendants, other than the defendant A., who was out of the jurisdiction of this Court, having appeared to the plaintiff's bill, a decree has been made, dated, &c., directing certain accounts and inquiries to be taken and made, and that the said defendant A. has since returned within the jurisdiction of this Court, and is desirous of attending the proceedings under the said decree; and upon hearing counsel for the plaintiff [*or*, upon reading an affidavit, &c., of notice to the plaintiff], and the defendant by his counsel submitting to be bound by the said decree, dated, &c., and the several proceedings already had in this cause, this Court doth [by consent] order, that the defendant A. be at liberty to enter an appearance to the plaintiff's bill in this cause, and have the like benefit of the decree, and to attend all subsequent proceedings in this cause, as if he had appeared at the hearing of the same. 2 Seton Dec. (Eng. ed. 1862) 1250.

## (1a.) DECLARATION THAT PERSONS RESIDING OUT OF THE STATE HAVE BECOME PARTIES TO THE SUIT, AND SUBJECT TO THE JURISDICTION OF THE COURT.

[*Among other things.*] And this Court doth further declare, that said G. K. J. and L. M., two of the defendants named in said bill, having been duly served with process, and appeared and answered thereto, have become parties to said suit and subject to the jurisdiction of this Court therein.<sup>1</sup>

## 2. ORDER FOR GUARDIAN AD LITEM.

(a.) *Guardian assigned on application of infant or non compos.*

Upon motion, &c., who alleged that the said defendant C. is an infant [*or*, a person of unsound mind not so found by inquisition], and

<sup>1</sup> Pingree v. Coffin, 12 Gray, 311.

that [*name and description of proposed guardian*] is a fit and proper \* person to be appointed his guardian, and has no interest \* 2368 in this suit adverse to the said infant [*or, lunatic*], as by an affidavit, &c., appears; and upon reading the said affidavit, this Court doth order, that the said — be assigned the guardian of the said infant [*or, lunatic*] C., by whom he may defend this suit. 2 Seton Dec. (Eng. ed. 1862) 1250.

(b.) *Another form: infants.*

[U. States C. C.]

In Equity.

C. F. A., Ex'r, v. W. C. J. *et al.*

On this — day of —, it appearing to the Court, &c., that M. A. J., L. C. J., and J. Q. A. J., defendants in this suit, are infants under the age of twenty-one years, it is ordered that R. S. S., Jr., of, &c., Esq., be, and he hereby is, appointed guardian *ad litem* of the said J. Q. A. J.; and F. E. P., of, &c., Esq., be, and he hereby is, appointed guardian *ad litem* of said M. A. J., and L. C. J.

By the Court.

H. W. F., *Clerk.*

(c.) *Another form.*

Supreme Judicial Court.

C. G. L., Ex'r, v. I. T. *et al.*

In Equity.

On motion of the plaintiff's solicitor it is ordered, that Mr. A. C. C., a counsellor of this Court, be appointed guardian *ad litem* of Anna Thorndike *alias* Bayerl, an infant under the age of twenty-one years, one of the defendants to this suit.

By order of T. M., &c.

February 18, 1862.

### 3. ORDERS FOR LEAVE TO AMEND.

(a.) *Order for leave to amend an injunction bill sworn to, on petition praying for leave to amend the bill, by rectifying such statements as were not within plaintiff's actual knowledge when the bill was drawn, according to what plaintiff now believes to be true, and by omitting such matters as were alleged in the bill on plaintiff's belief only, and are immaterial, and by inserting other matters and charges, as plaintiff should be advised to be material.*

It is hereby ordered, "that the petition of the plaintiff be granted, so far as she be at liberty, within — days, to amend her bill by \*inserting such additional statements, matters, and charges as \* 2369 she shall be advised are material, and that the same be made without prejudice to the injunction; and that the defendants B. G., J. W., and T. H. answer the exceptions and the amendments together; and

that the residue of the prayer of the petition be denied, with liberty, nevertheless, to the plaintiff, at her election, to act under this order, or on or before the first day of the next term, upon payment of the costs of resisting this motion, to renew her motion, upon due notice thereof, to amend, accompanied with an affidavit, stating clearly and precisely the amendments, alterations, and omissions proposed."

(b.) *To withdraw replication and amend.*

Upon motion, &c., and upon hearing counsel for [*or*, reading an affidavit of notice to] the defendant, This Court doth order, that the plaintiff be at liberty to withdraw his replication, and amend his bill filed in this cause, as he may be advised; and it is ordered, that the plaintiff A. do pay to the defendant B. his costs of this suit up to the present time, and also the costs of this application, to be taxed, &c. *Champneys v. Buchan* (1854), 2 Seton Dec. (Eng. ed. 1862) 1253.

#### 4. ANSWERS.

(a.) *To put in answer in foreign language.*

Upon motion, &c., who alleged that the defendant A. hath appeared to the plaintiff's bill, and that the defendant A. lives at —, and does not understand the English language; this Court doth order, that the said defendant A. be at liberty to swear his answer in the — language, and that —, a notary public, be appointed to translate the same into English, and be sworn to the true translation thereof, and that such translation be filed with the original answer, but notice hereof is first to be given to the plaintiff's solicitor. 2 Seton Dec. (Eng. ed. 1862) 1254.

(b.) *Order on the hearing of exceptions for insufficiency.*

The exceptions taken by the plaintiff to the sufficiency of the defendant's answer to the interrogations filed by the plaintiff for the examination of the said defendant, in answer to the plaintiff's bill, coming on, &c., to be argued before this Court, in the presence of counsel for the plaintiff and for the said defendant; and the said exceptions being opened, upon debate of the matter and hearing the defendant's answer, and the said exceptions taken thereto, read, and what was alleged by the counsel for the plaintiff and for the defendant;

\* 2370 \* *Allowed.* — This Court held the answer of the defendant to be insufficient in the points excepted to; and doth order that the said exceptions [do stand and] be allowed. — Direction for payment of costs by defendant, and time to answer, if any :

*Overruled.* — This Court held the answer of the said defendant to be sufficient in the points excepted to; and doth order that the said exceptions be overruled. — Direction for payment of costs by plaintiff, and liberty to amend, if any :

*Some allowed, others overruled.* — This Court held the answer of the said defendant to be insufficient in the points excepted to by the 1st,



2d, 3d, 4th, and 5th of the said exceptions; and doth order that the said exceptions, 1st, 2d, 3d, 4th, and 5th [do stand and] be allowed; and this Court held the answer of the said defendant to be sufficient in the points excepted to by the 6th and 7th of such exceptions; and doth order that the said 6th and 7th of such exceptions be overruled; and it is ordered, that the costs of the plaintiff and the defendant of all the said exceptions be taxed by, &c., who is to certify the amount of five-seventh parts of such costs of the plaintiff, and two-seventh parts of the said costs of the said defendant, and deduct the said two-seventh parts of the said defendant's costs from the amount of the said five-seventh parts of the costs of the plaintiff, and certify the balance; and it is ordered, that the said defendant A. do pay to the plaintiff B. the balance so certified. — Time to answer, if any. 2 Seton Dec. (Eng. ed. 1862) 1256.

### 5. DEMURRER AND PLEA.

#### *Order on hearing demurrer or plea.*

The demurrer [*or, plea*] put in by the defendant to the whole [*or, part*] of the plaintiff's bill coming on, &c., to be argued before this Court in the presence of counsel for the plaintiff and for the defendant [*If so, add, and the said defendant by his counsel demurring orally to the said bill for want of parties*]; upon opening and debate of the matter, &c., This Court [*If standing for judgment, add, did order, that the said demurrer (or, plea) should stand for judgment, and the same standing, &c.*]; [*If allowed, This Court held the said demurrer (or, plea) to be good and sufficient, and doth therefore order, that the same do stand and be allowed*]; [*If plaintiff undertakes to reply to plea, And the plaintiff by his counsel undertaking to reply to the said plea, it is ordered, that the costs occasioned by the said plea be costs in the cause*]; and that the plaintiff A. do pay to the said defendant B. his costs of \* the said demurrer [*or, plea*]; *If to the whole bill* \* 2371 *and no liberty to amend given, add, and also his further costs of this suit to be taxed by, &c.* — Liberty to amend [*If any, and if so, add, but in default of the plaintiff amending his bill within (three weeks) from this date, it is ordered, that the plaintiff A. do pay to the defendant B. his further costs of this suit, to be taxed by, &c.*] — [*If overruled, This Court held the said demurrer [or, plea] to be insufficient, and doth therefore order that the same be overruled.*] — Direction as to costs; time to answer, if any. Seton 2 Dec. [Eng. ed. 1862] 1258.

### 6. DEFENDANT OUT OF JURISDICTION.

#### *(a.) Order for service of bill on defendant out of jurisdiction.*

Upon motion this day made unto this Court by — of counsel for the plaintiff, it was alleged that the plaintiff has exhibited his bill in this Court against the defendants, A. B., &c., and that they reside at Naples, and that the defendant C. D. resides at Pesth; it was therefore prayed that the plaintiff may be at liberty to serve a copy of the [printed] bill filed in this cause, and the indorsement thereon, on the defendants A. B., &c., at Naples or elsewhere, and on the defendant at

Pesth or elsewhere in Hungary; and the time within which the said defendants A. B., &c., are to appear to the said bill is to be fourteen days after such service, and the time within which the said last-mentioned defendant C. D. is to appear to the said bill, is to be eighteen days after such service. Tripp's Forms, 117.

(b.) *Order for plaintiff to be at liberty to appear for defendant served with bill out of the jurisdiction.*

Whereas by an order, &c., [*Recite the order authorizing service abroad*]. Now, upon motion this day made unto this Court by —, of counsel for the plaintiff, it was alleged that on the — day of —, the said defendant A. B. was duly served at Naples with a [printed] copy of the said bill and the indorsement thereon, and a copy of the said order, as by the affidavit of the plaintiff and an exhibit marked A, being a notarial certificate in the Italian language of the service of copies of the said bill and duplicate order on the said defendant appears; but the said defendant A. B. hath not entered an appearance to the said bill, as by the — clerk's certificate appears; it was therefore prayed that the plaintiff may be at liberty to enter an appearance to his said bill for the said defendant A. B., which, upon hearing the said order, the notarial certificate, an affidavit of A. E., and certificate read, is ordered accordingly. Tripp's Forms, 118.

\* 2372 \* (c.) *Order to take bill pro confesso, defendant being out of the jurisdiction.*

Upon motion, &c., made, &c., by, &c., it was alleged that the defendant F. de H. appeared to the plaintiff's bill, but not having put in his answer within the time limited by the Court in that behalf, an attachment was issued against him for want of his answer, directed to the sheriff of —, who hath returned *non est inventus* thereon; that it appears by the affidavit of G. R., that the plaintiff is unable with due diligence to procure a writ of attachment for want of his answer to be executed against the defendant, by reason of his being out of the jurisdiction of this Court; that the said defendant hath not put in his answer, as by the — clerk's certificate appears; it was therefore prayed that the plaintiff's bill might be taken *pro confesso* against the said defendant; whereupon, and upon hearing the said affidavit, an affidavit of R. H., an affidavit of J. D. W., of notice of this application to the defendant, and the said certificate read, this Court doth order that the clerk, &c., do attend on the — day of — next, with the record of the plaintiff's bill, in order that the same may be taken *pro confesso* against the said defendant F. de H. And it is ordered, that this order be served upon the said defendant. Tripp's Forms, 121.

#### 7. DECREE CONFIRMING ORDER PREVIOUSLY MADE *de bene* IN A CAUSE.

[*Among other things.*] And upon such hearing this Court doth determine, and doth so order and declare, that the order heretofore passed *de bene esse* in the cause, that the plaintiff be at liberty to examine as witnesses certain J. W. V. and S. S., two of the parties named in the bill of complaint, stand confirmed.<sup>1</sup>

<sup>1</sup> *Pingree v. Coffin*, 12 Gray, 311.

**RULES OF PRACTICE**

**FOR THE**

**COURTS OF EQUITY OF THE UNITED STATES.**



# RULES OF PRACTICE

FOR

## THE COURTS OF EQUITY OF THE UNITED STATES.

PROMULGATED BY THE SUPREME COURT OF THE UNITED STATES,  
JANUARY TERM, 1842.

AND

THE ADDITIONAL RULES AND AMENDMENTS OF RULES ADOPTED  
AND PROMULGATED SINCE THAT TIME.

### PRELIMINARY REGULATIONS.

#### I.

The Circuit Courts, as Courts of Equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits.

#### II.

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties or their solicitors, in all causes pending in Equity, in pursuance of the rules hereby prescribed.

#### III.

Any Judge of the Circuit Court, as well in vacation as in term, may, at chambers, or on the rule days at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the application therefor being first \* given to the adverse party, or his solicitor, to appear and \* 2376 show cause to the contrary, at the next rule day thereafter, unless some other time is assigned by the Judge for the hearing.

## IV.

All motions, rules, orders, and other proceedings, made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in Equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the Judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

## V.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the Court or of any Judge thereof, shall be deemed motions and applications grantable of course by the clerk of the Court. But the same may be suspended, or altered, or rescinded by any Judge of the Court, upon special cause shown.

## VI.

All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a Judge of the Court, be made on a rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any Judge of the Court *ex parte*, and granted, as if not objected to, or refused, in his discretion.

## VII.

The process of *subpœna* shall constitute the proper mesne process in all suits in Equity, in the first instance, to require the defendant to ap-

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pear and answer to the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the Court.

VIII.<sup>1</sup>

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ or execution, in the form used in the Circuit Court in suits at Common Law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the Court, or of a Judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

## IX.

When any decree or order is for the delivery of possession, upon proof made by affidavit, of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the Court.

## X.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the Court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause.

## \* SERVICE OF PROCESS.

\* 2378

XI.<sup>1</sup>

No process of *subpœna* shall issue from the clerk's office in any suit in Equity, until the bill is filed in the office.

<sup>1</sup> See *ante*, p. 1043, note.<sup>1</sup> See *ante*, p. 439, note.

## XII.

Whenever a bill is filed, the clerk shall issue the process of *subpæna* thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the *subpæna* shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of *subpæna* may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants or a joint *subpæna* against all the defendants.

## XIII.

The service of all *subpænas* shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

## XIV.

Whenever any *subpæna* shall be returned not executed as to any defendant, the plaintiff shall be entitled to another *subpæna*, *toties quoties*, against such defendant, if he shall require it, until due service is made.

## XV.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the Court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

## XVI.

Upon the return of the *subpæna* as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the Court, and shall state the time of the entry.

XVII.<sup>1</sup>

The appearance-day of the defendant shall be the rule-day to which the *subpæna* is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance-day

<sup>1</sup> See *ante*, p. 536, note (a).



shall be the next rule-day succeeding the rule-day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

### BILLS TAKEN PRO CONFESSO.<sup>1</sup>

#### XVIII.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a Judge of the Court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule-day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the Court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the Court or a judge thereof may direct as to pleading to or fully answering the bill, within a period to be fixed by the Court or Judge, and undertaking to speed the cause. [Promulgated Oct. 28, 1878. 97 U. S.]

#### XIX.<sup>2</sup>

When the bill is taken *pro confesso*, the Court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the Court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the Court shall deem reasonable, and unless the defendant shall undertake

<sup>1</sup> Under rules 18, 19, a final decree for want of appearance can be rendered at the first term after service of the subpoena only when another rule-day has intervened. *O'Hara v. MacConnell*, 93 U. S. 150; see *Consolidated Fruit Jar Co. v. Strong*, 2 N. J. L. J. 338. Service of a copy of an interlocutory decree, taking the bill *pro confesso*, is not necessary before the final decree. *Bank of United States v. White*, 8 Pet. 262; see *Wallace v. Clark*, 3 Wood. & M. 359. Under rule 19 a third person can intervene and have a sale set aside upon paying the

previous purchaser's expenses, and making an absolute and unconditional bid, but not necessarily paying the money into Court, when his advance in price shows that the property has been clearly undersold. *Blackburn v. Selma R. Co.* 3 Fed. Rep. 689. Under rule 18, a decree which is not confined to the matter of the bill, may be attacked on appeal for that reason. *Central R. Co. v. Central Trust Co.* 133 U. S. 83, 91.

<sup>2</sup> See *ante*, pp. 517, note (a), 1286, note (a).

to file his answer within such time as the Court shall direct, and submit to such other terms as the Court shall direct, for the purpose of speeding the cause. [Promulgated Oct. 28, 1879. 97 U. S.]

## XX.

Every bill in the introductory part thereof, shall contain the names, places of abode, and citizenship, of all the parties, plaintiffs and defendants, by and against whom the bill is brought.<sup>1</sup> The form, in substance, shall be as follows: "To the Judges of the Circuit Court of the United States for the District of ——. A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says that, &c."

XXI.<sup>2</sup>

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at Law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defence or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall also be specially asked for.

## XXII.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the Court, or that they cannot be joined without ousting the jurisdiction of the Court as to the other parties. And as to persons who are without the jurisdiction and may properly

<sup>1</sup> Under this rule, the introductory part of the bill should set out the defendants' names with their citizenship. *United States v. Pratt Coal Co.* 18 Fed. Rep. 708.

<sup>2</sup> See *ante*, pp. 560, note (a), 620, note (a).

be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

XXIII.<sup>1</sup>

The prayer for process of *subpoena* in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under \*guardianship, shall state the fact, so that the Court may \* 2381 take order thereon, as justice may require upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

XXIV.<sup>2</sup>

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

## XXV.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State Court of Chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

## SCANDAL AND IMPERTINENCE IN BILLS.

## XXVI.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, *in hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a Master, by any Judge of the Court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the Court or a Judge thereof shall otherwise order. If the Master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

<sup>1</sup> See *ante*, p. 390, note (a).

<sup>2</sup> See *ante*, p. 312, note (a).

## XXVII.

No order shall be made by any Judge for referring any bill, answer, or pleading, or other matter or proceeding, depending before the Court, for scandal or impertinence unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the Master to examine and report for the same on or before the next succeeding rule-day, or the Master shall certify that further time is necessary for him to complete the examination.

## AMENDMENTS OF BILLS.

## XXVIII.

The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filing blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and, if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

## XXIX.<sup>1</sup>

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any Judge of the Court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the Court or a Judge thereof may in his discretion direct.

<sup>1</sup> See *ante*, p. 417, note (b). After long delay, and the filing of answers and replications, and the taking of depositions, the plaintiff must show why the amendment was not made earlier. *Ross v. Carpenter*, 6 McLean, 382; see *Brown v. White*, 16 Fed. Rep. 900. The Court will not hear a motion to set aside an order of amendment, made for the purpose

of getting rid of amendments regularly made under the leave granted. *Lichtenauer v. Cheny*, 3 McCrary, 119; 8 Fed. Rep. 876. It is ground for reversal on appeal if an amended bill was filed without leave of Court, contrary to this rule, after the cause was regularly at issue. *Washington Railroad v. Bradleys*, 10 Wall. 299. See *ante*, p. 409, note (a).

But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a Judge of the Court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the Judge for speeding the cause.

## XXX.

If the plaintiff, so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill as the case may require, in the clerk's office on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

## \* DEMURRERS AND PLEAS.

\* 2383

XXXI.<sup>1</sup>

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant, that it is not interposed for delay; and, if a plea, that it is true in point of fact.

XXXII.<sup>2</sup>

The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the Court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

XXXIII.<sup>3</sup>

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

<sup>1</sup> See *ante*, p. 686, note (a); *National Bank v. Ins. Co.* 104 U. S. 54. See *ante*, pp. 542, note (a), 590, note (b).

<sup>2</sup> The defendant cannot demur, plead, and answer to the whole bill at the same time.

*Crescent City Live-Stock Co. v. Butchers' Union Live-Stock Co.* 12 Fed. Rep. 225. See *Hayes v. Dayton*, 18 Blatch. 420. See *ante*, pp. 601, note (a), 608, note (a).

<sup>3</sup> See *ante*, pp. 594, n. (a), 694, n. (a), 983,

XXXIV.<sup>4</sup>

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period unless the Court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the Court, be reasonably done; in default whereof, the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

## XXXV.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the Court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.<sup>5</sup>

## XXXVI.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

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\* XXXVII.<sup>1</sup>

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

XXXVIII.<sup>2</sup>

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule-day when the same is filed, or on

n. (a); under Rule 33, the sufficiency of a plea is admitted by a replication filed thereto, and upon final hearing the Court may now proceed as when the benefit of a decree is saved to the hearing. *Pearce v. Rice*, 142 U. S. 28, 42.

<sup>4</sup> See *ante*, p. 700, note (a). Leave to answer must be given on overruling a plea. *Wooster v. Blake*, 7 Fed. Rep. 816.

<sup>5</sup> Such leave to amend the bill after a demurrer has been sustained is a matter of discretion, and a refusal thereof is not reviewable. *National Bank v. Carpenter*, 101 U. S. 561.

<sup>1</sup> Rule 37 applies when a demurrer and answer are put in to the whole bill at the same time. *Hayes v. Dayton*, 18 Blatch. 420. See *ante*, p. 601, note (a).

<sup>2</sup> A decree dismissing the bill under this rule is not a bar to a subsequent suit. *Keller v. Stolzenbach*, 20 Fed. Rep. 47. See *ante*, pp. 594, note (a), 659, note (b), 829, note (a).

the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a Judge of the Court shall allow him further time for the purpose.

## ANSWERS.

XXXIX.<sup>3</sup>

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defence. Thus, for example, a *bona fide* purchaser, for a valuable consideration without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

## XL.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

## DECEMBER TERM, 1850.

*Ordered*, that the fortieth rule, heretofore adopted and promulgated by this Court as one of the rules of practice in suits in Equity in the Circuit Courts, be, and the same is hereby, repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery. [10 How. Introd. v.]

<sup>3</sup> Under this rule the plaintiff is deprived of the benefit of the defendant's answer, though he may call the defendant as a witness, and he has the burden of proving his bill. *Gaines v. Agnelly*, 1 Woods, 238. If the defence of the Statute of Limitations is well pleaded, the defendant need not answer further to

such parts of the bill as are covered by it. *Samples v. Bank*, 1 Woods, 523. This rule does not prevent the setting up of matter in abatement by plea instead of by answer at the defendant's option. *United States v. Gillespie*, 6 Fed. Rep. 803. See *ante*, p. 737, note (a).

## XLI.

The interrogatories contained in the interrogating part of the \* 2385 bill \* shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc. ; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, etc. ;" and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

DECEMBER TERM, 1871.

*Amendment to 41st Equity Rule.*

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only ; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or any other incidental motion in the cause ; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864. [13 Wall. Introd. xi.]<sup>1</sup>

XLII.<sup>2</sup>

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.

## XLIII.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words, "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say: —

"1. Whether, etc."

"2. Whether, etc."

<sup>1</sup> See *ante*, pp. 737, note (a), 1663, note (a).

<sup>2</sup> Apart from such note, the defendant need answer only as specifically as the stating part

of the bill charges. *Buerk v. Imhaeuser*, 20 Blatch. 274.



XLIV.<sup>3</sup>

A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

XLV.<sup>4</sup>

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the Court, or a Judge thereof, may in his discretion direct.

## \* XLVI.

\* 2386

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer, on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time therefor is enlarged or otherwise ordered by a Judge of the Court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

PARTIES TO BILLS.<sup>1</sup>XLVII.<sup>2</sup>

In all cases where it shall appear to the Court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the Court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the Court as to the parties before the Court, the Court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

## XLVIII.

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all

<sup>3</sup> A defendant, who answers to part of the bill, may still decline to answer any interrogatory against which he could protect himself by demurrer. *Fuller v. Knapp*, 24 Fed. Rep. 100.

<sup>4</sup> Under this rule new matter is to be pleaded by amending the bill by leave of Court. *Dupont v. Massey*, 4 Wash. 128; *Wilson v. Stolley*, 4 McLean, 275. But facts occurring after the filing of the bill cannot be introduced by amending it. *Mason v. Hartford, &c. R. Co.* 10 Fed. Rep. 334; see *ante*, p. 829, note (a).

<sup>1</sup> See *Gross v. George W. Scott Manuf. Co.* 48 Fed. Rep. 35. In a suit by a stockholder "for himself and all others similarly interested who may join," those who, though similarly interested, do not join, are "absent" parties under Rules 47, 48, and are not bound by the decree. *Coann v. Atlanta Cotton Factory Co.* 14 Fed. Rep. 4.

<sup>2</sup> See *ante*, pp. 149, note (a), 190, note, 243, note (a.)

brought before it, the Court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

XLIX.<sup>3</sup>

In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the Court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

\* 2387

\* L.

In suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party where he desires to have the will established against him.

## LI.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

## LII.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following (that is to say): "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the Court, if it thinks fit, shall be at liberty to dismiss the bill.

<sup>3</sup> See *Chew v. Hyman*, 10 Biss. 240; *ante*, p. 222, note 2.

## LIII.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description of parties to whom the objection applies, the Court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

## NOMINAL PARTIES TO BILLS.

## LIV.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the *subpœna* upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer, he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the Court shall otherwise direct.

## INJUNCTIONS.

\* LV.<sup>1</sup>

\* 2388

Whenever an injunction is asked for by the bill to stay proceedings at Law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the Court in term, or by a Judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction — either the common injunction or a special injunction — is awarded in vacation, it shall, unless previously dissolved by the Judge granting the same, continue until the next term of the Court, or until it is dissolved by some other order of the Court.

## BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

LVI.<sup>2</sup>

Whenever a suit in Equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor,

<sup>1</sup> See *ante*, p. 1614, note (a).

<sup>2</sup> In the Federal Courts, the judiciary act of 1789 governs to the exclusion of state practice as to revival, and Rule 56 is declaratory of the Statute. *Fitzpatrick v. Domingo*, 14 Fed. Rep. 216. An order to revive is necessary if the

defendant dies while a patent case is before a commissioner to assess damages, after an interlocutory decree establishing the plaintiff's patent and claim of infringement. *Atterbury v. Gill*, 13 Pat. Off. Gaz. 276.

or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process or *subpoena* shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

## LVII.

Whenever any suit in Equity shall become defective from any event happening after the filing of the bill (as, for example, by a change of interest in the parties), or for any other reason, a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any Judge of the Court on any rule-day, upon proper cause shown, and due notice to the other party.<sup>3</sup> And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto, on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a Judge of the Court.

## LVIII.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

\* 2389

\* ANSWERS.

## LIX.

Every defendant may swear to his answer before any Justice or Judge of any Court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any Master in Chancery appointed by any Circuit Court, or before any Judge of any Court of a State or Territory, [or before any notary public.]<sup>1</sup>

## AMENDMENT OF ANSWERS.

## LX.

After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or refer-

<sup>3</sup> See *ante*, p. 1517, note (a). Upon such petition for leave, the Court simply determines the question of probable cause, and the petition need not, therefore, contain all the averments

of the supplemental bill. *Parkhurst v. Kinsman*, 2 Blatch. 72.

<sup>1</sup> The clause in brackets was added Mar. 5, 1889. 129 U. S. 701.

ence to a document, or other small matter, and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the Court or of a Judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit;<sup>2</sup> and in every case where leave is so granted, the Court or the Judge granting the same may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

## EXCEPTIONS TO ANSWERS.

LXI.<sup>3</sup>

After an answer is filed on any rule-day, the plaintiff shall be allowed until the next succeeding rule-day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the Court or a Judge thereof; and, if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

## LXII.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a Master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

\* LXIII.<sup>1</sup>

\* 2390

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a Judge of the Court, and shall enter, as of course, in the order-book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be

<sup>2</sup> Cause for amending an answer is not shown if new matter, proposed to be thus introduced, could have been earlier introduced by reasonable diligence. *India Rubber Comb Co. v. Phelps*, 8 Blatch. 85.

<sup>3</sup> If the plaintiff does not duly except for insufficiency, an answer which only denies knowledge of the facts alleged in the bill, prevents the bill being taken as confessed. *Brown*

*v. Pierce*, 7 Wall. 205. See *Bradford v. Geiss*, 4 Wash. 513.

<sup>1</sup> Under Rule 63, exceptions to an answer for insufficiency must be set down on a rule-day for hearing before the Court; and the exceptions are abandoned if they are referred to a Master and on a day not a rule-day. *La Vega v. Lapsley*, 1 Woods, 428.

deemed sufficient; provided, however, that the Court, or any Judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

#### LXIV.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the Court, or of a Judge thereof, upon his putting in such answer, and complying with such other terms as the Court or Judge may direct.

#### LXV.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the Court, or the Judge thereof, at the hearing upon the exceptions.

#### REPLICATION AND ISSUE.

#### LXVI.<sup>2</sup>

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and \* 2391 the suit shall thereupon stand dismissed, unless the Court, or \* a Judge thereof, shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

<sup>2</sup> The order of dismissal for want of a replication is of course, no action by the Court being necessary. *Robinson v. Satterlee*, 3 Sawyer, 134. The Court may in its discretion allow a replication filed later than the time limited to stand, and at the hearing admit

testimony taken more than three months after filing it. *Fischer v. Hayes*, 19 Blatch. 26. The plaintiff must reply to each defendant's answer. *Coleman v. Martin*, 6 Blatch. 291. See *ante*, p. 802, n., 879, note (a).

## TESTIMONY — HOW TAKEN.

LXVII.<sup>2</sup>

Ordered, That all parts of Rule 67 of the Rules of Practice for the Courts of Equity of the United States, as now existing, be, and the same are hereby, superseded, and the following rule is promulgated as such Rule 67:

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony.

Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court.

<sup>2</sup> Rule 67, with its amendments, was previously as follows: —

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross interrogatories before the issuing of the commission, and, if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners shall be named by the Court or by a Judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.

December Term, 1854.

Ordered, that the sixty-seventh rule governing Equity practice be so amended as to allow the presiding Judge of any Court exercising jurisdiction, either in term time or vacation, to vest in the clerk of said Court general power to name commissioners to take testimony in like manner that the Court or Judge thereof can now do by the said 67th rule. Test:

Wm. Thos. Carroll, C. S. C. U. S.

December Term, 1861.

Ordered, That the last paragraph in the 67th rule in Equity be repealed, and that the rule be amended as follows: —

Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the Court, or before an examiner to be specially appointed by the Court, the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors; and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted, as near as may be, in the mode now used in Common-law Courts. The depositions taken upon such oral examination shall be taken down in writing by the examiner, in the form of narrative, unless he determines the examination shall be by question and answer, in special instances, and, when completed, shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend, provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner may upon all examinations, state any special matters to the Court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the Court shall have power to deal with the costs of incompetent, im-

The examiner, if he so request, shall be furnished with a copy of the pleadings.

Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts.

The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; provided, that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skilful stenographer or by a skilful typewriter, as the examiner may elect, and when taken stenographically shall be put into type-writing or other writing; provided, that such stenographer or typewriter has been appointed by the court, or is approved by both parties.

The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; provided, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

In case of refusal of witnesses to attend, to be sworn, or to answer any

material, or irrelevant depositions, or parts of them, as may be just.

In the compulsory attendance of witnesses, in case of refusal to attend to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practised with respect to witnesses, to be produced on examination before an examiner of said Court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the Court, to be there filed of record in the same mode as prescribed in the thirtieth section of Act of Congress, September 24, 1789.

Testimony may be taken on commission, in the usual way, by written interrogatories and cross-interrogatories, on motion to the Court, in term time, or to a Judge in vacation, for special reasons satisfactory to Court or Judge. See further amendment, December Term, 1869, and 139 U. S. 707.

As to the change made in Rule 67 in 1861, see *Bischoffsheim v. Baltzer*, 20 Blatch. 229. Upon this Rule, see *Blease v. Garlington*, 92 U. S. 1; *Van Hook v. Pendleton*, 2 Blatch. 85; *Western Division, &c. R. Co. v. Drew*, 3 Woods. 691; *Sickles v. Gloucester Co.* 3 Wall. Jr. 186; *Ballard v. McCluskey*, 52 Fed. Rep. 677; *Arnold v. Cheseborough*, 35 id. 16. Congress has not conferred upon the circuit and district Courts power to make rules respecting the mode of taking testimony. *Randall v. Venable*, 17 Fed. Rep. 162. See *ante*, pp. 888, note (a), 901, note 6, 912, note (a).



question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practised with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in section 865 of the Revised Statutes.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons, satisfactory to the court or judge.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defence, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties, or by leave of court first obtained, on motion for cause shown.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

[Promulgated May 2, 1892. 144 U. S. 689.]

Rule 67 was amended May 15, 1893, by adding thereto: "Upon due notice given as prescribed by previous order, the court may, in its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court on final hearing." 149 U. S. 793.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the Acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the Acts of Congress, if a Court or a Judge thereof shall, under all the circumstances, deem it reasonable.

<sup>1</sup> Under Rule 68, witnesses are to be examined orally in Court for formal purposes, such as verifying a document set out in the plead-

ings, and are not there to be subjected to an extended examination. *Western Division R. Co. v. Drew*, 3 Woods, 691.

LXIX.<sup>2</sup>

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the Court, or a Judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any Judge \* 2393 \* of the Court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances; but, by consent of the parties, publication of the testimony may at any time pass in the clerk's office, such consent being in writing, and a copy thereof entered in the order-book, or indorsed upon the deposition or testimony.

## TESTIMONY DE BENE ESSE.

## LXX.

After any bill filed and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the Court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a Judge of the Court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

## FORM OF THE LAST INTERROGATORY.

## LXXI.

The last interrogatory, in the written interrogatories to take testimony now commonly in use, shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

## CROSS-BILL.

LXXII.<sup>1</sup>

Where a defendant in Equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be com-

<sup>2</sup> Rule 69 is imperative that testimony taken after time cannot be read at the hearing. *Wooster v. Clark*, 9 Fed. Rep. 854. The three months allowed applies to both the plaintiff's and defendant's testimony. *Ingle v. Jones*, 9

Wall. 486; *Sharon v. Hill*, 22 Fed. Rep. 28. The "cause" is not at issue until it is at issue as to all the defendants. *Gilbert v. Van Arman*, 1 Flipp. 421. See *ante*, p. 890, note (a).

<sup>1</sup> See *ante*, p. 145, note (a)

pellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

#### REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

##### LXXIII.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the Master, to whom it is referred to take the same, to inquire and state to the Court what parts, if any, \* of such personal estate are outstanding or undisposed of, \* 2394 unless the Court shall otherwise direct.

##### LXXIV.

Whenever any reference of any matter is made to a Master to examine and report thereon, the party at whose instance or for whose benefit the reference is made, shall cause the same to be presented to the Master for a hearing on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the Master, at the costs of the party procuring the reference.

##### LXXV.

Upon every such reference, it shall be the duty of the Master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the Master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the Master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the Court, or a Judge thereof, for an order to the Master to speed the proceedings and to make his report, and to certify to the Court or Judge the reasons for any delay.

##### LXXVI.<sup>1</sup>

In the reports made by the Master to the Court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the Court what state of facts, charge, affidavit, deposition, examination, or answer was so brought in or used.

<sup>1</sup> Under U. S. Equity rule 76, a commissioner's report need not state what facts he considers proved by the evidence. *McCormack v. James*, 36 Fed. Rep. 14.

LXXVII.<sup>2</sup>

The Master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the \* 2395 \* clerk's office or by deposition, according to the Act of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

LXXVIII.<sup>1</sup>

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a Master or examiner appointed in any cause, by *subpoena* in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, Master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in Court; and if any witness shall refuse to appear, or give evidence, it shall be deemed a contempt of the Court, which being certified to the clerk's office by the commissioner, Master, or examiner, an attachment may issue thereupon by order of the Court or of any Judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the Court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open Court, if the Court shall, in its discretion, deem it advisable.

LXXIX.<sup>2</sup>

All parties accounting before a Master shall bring in their respective accounts in the form of debtor and creditor; and any of the other

<sup>2</sup> Under Rule 77 the admission of evidence rests in the Master's sound discretion. *Wooster v. Gumbirner*, 20 Fed. Rep. 167. Under this rule, an officer of a corporation may be required to bring its books from its office and produce them before the Master. *Erie Ry. Co. v. Heath*, 8 Blatch. 413. Since its adoption a plaintiff does not preclude himself from taking a decree against a defendant by examining the latter as a witness before a Master. *Jenkins v. Greenwald*, 1 Bond, 126, 133. See

*ante*, pp. 1171, note (a), 1180, note (a). 1304, note (a).

<sup>1</sup> Rule 78 does not change the English practice so as to allow the oral examination of witnesses on the trial beyond matters of formal proof. *Western Division, &c., R. Co. v. Drew*, 3 Woods, 691. See *ante*, pp. 888, note (a), 900, note 6.

<sup>2</sup> Rule 79 abolishes the old method of proving the account, item by item. *Pulliam v. Pulliam*, 10 Fed. Rep. 23; *Hatch v. Indianapolis & S. R. Co.* 9 id. 856.

parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, in the Master's office, or by deposition, as the Master shall direct.

LXXX.<sup>3</sup>

All affidavits, depositions, and documents which have been previously made, read, or used in the Court upon any proceeding in any cause or matter may be used before the Master.

## LXXXI.

The Master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the Master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the Court, if necessary.

\* LXXXII.<sup>1</sup>

\* 2396

(As amended at October Term, 1893. 152 U. S. 709.)

The Circuit Courts may appoint standing Masters in Chancery in their respective districts (a majority of all the judges thereof, including the Justice of the Supreme Court, the Circuit Judges, and the District Judge for the District, concurring in the appointment), and they may also appoint a Master *pro hac vice* in any particular case. The compensation to be allowed to every Master in Chancery for his services in any particular case shall be fixed by the Circuit Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the Court shall direct. The Master shall not retain his report as security for his compensation; but when the compensation is allowed by the Court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the Court.

## EXCEPTIONS TO REPORT OF MASTER.

LXXXIII.<sup>2</sup>

The Master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk

<sup>3</sup> Rule 80 does not apply to testimony taken by the examiner for the hearing in chief, under a decree for an accounting in an infringement suit, which was not brought before the Master in making up the case. *Bell v. United States Stamping Co.* 32 Fed. Rep. 549.

<sup>1</sup> This rule does not enable a party to collect from his opponent disbursements which are taxable as part of the costs in a final decree.

*Mallory Manuf. Co. v. Fox*, 20 Fed. Rep. 409. In cases of difficulty or importance, additional compensation may be allowed to a Master notwithstanding the rate fixed for such services by a rule of the Circuit Court under this provision. *Doughty v. West, B. & C. Manuf. Co.* 8 Blatch. 107. See *ante*, p. 1434, note (a).

<sup>2</sup> See *ante*, pp. 1304, note (a), 1312, note (a).

in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the Court, if the Court is then in session; or, if not, then at the next sitting of the Court which shall be held thereafter, by adjournment or otherwise.

## LXXXIV.

And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs; the costs to be fixed in each case by the Court, by a standing rule of the Circuit Court.<sup>3</sup>

## DECREES.

## LXXXV.

Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrolment thereof, be corrected by order of the Court or a Judge thereof, upon petition, without the form or expense of a rehearing.

LXXXVI.<sup>4</sup>

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any \*2397 Master, \*nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:" [Here insert the decree or order.]

## GUARDIANS AND PROCHEIN AMIS.

LXXXVII.<sup>1</sup>

Guardians *ad litem* to defend a suit may be appointed by the Court, or by any Judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the Court may direct for the protection of infants and other persons.

<sup>3</sup> Costs cannot be thus imposed if the Circuit Court has made no standing rule. *Garretson v. Clark*, 17 Blatch. 256. The power of the Circuit Court to impose costs under this rule was limited by the fee bill of 1853 (now U. S. Rev. Stats. § 823). *Ibid*.

<sup>4</sup> A decree dismissing the bill without costs

as to the only defendant who appeared to litigate is a final decree, and is sufficient in form under rule 86. *Judson v. Courier Co.* 25 Fed. Rep. 705. See *ante*, p. 2252, note.

<sup>1</sup> See *Colt v. Colt*, 111 U. S. 566; *Sprague v. Litherberry*, 4 McLean, 442; *Walton v. v. Coulson*, 1 McLean, 120; *ante*, p. 109, n. (a).

LXXXVIII.<sup>2</sup>

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the Court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the Court, in the discretion of the Court.

## LXXXIX.

[As amended April 16, 1894.]

The Circuit Courts (a majority of all the Judges thereof, including the Justice of the Supreme Court, the Circuit Judges, and the District Judge for the District, concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

XC.<sup>3</sup>

In all cases where the rules prescribed by this Court or by the Circuit Court, do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the Court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

## \* XCI.

\* 2398

Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

<sup>2</sup> Under Rule 88, where no appeal lies from a final decree of the Circuit Court, it may in its discretion allow a rehearing before the end of the next term. *Newman v. Moody*, 19 Fed. Rep. 858. See further *Wooster v. Handy*, 21 id. 51; *ante*, pp. 1019, 1478, notes.

<sup>3</sup> Under Rule 90, the English practice in 1842, and not later, is to be followed. *Evory v. Candee*, 17 Blatch. 200; *Goodyear v. Providence Rubber Co.* 2 Cliff. 351; *Pomeroy v. Manin*, 2 Paine, 476. The Supreme Court rules should not be construed as depriving the Circuit Courts of power and discretion as to the conduct of trials, and the order and time of

introducing evidence. *Poultney v. La Fayette*, 12 Peters, 472; *Philadelphia & Trenton R. Co. v. Stimpson*, 14 Peters, 448. See *Wallace v. Clark*, 3 Wood. & M. 359. The Equity Rules are framed to bring causes to a hearing, and do not apply to a cause that has been heard. *Neale v. Neales*, 9 Wall. 1; *Wisner v. Grant*, 7 Fed. Rep. 485; *ante*, p. 417, note (b). A rule of practice, established under an act of Congress, has the force of a statute. *Scott v. The Young America*, Newb. Adm. 107. But a rule of Court is void so far as it conflicts with a statute. *Gray v. Chicago, &c. R. Co.* Woolw. 63. See *ante*, p. 1, note.

XCII.<sup>1</sup>

DECEMBER TERM, 1863.

*Ordered*, that in suits in Equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any Court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this Court regulating the Equity practice, where the decree is solely for the payment of money.

## INJUNCTIONS.

XCIII.<sup>2</sup>

OCTOBER TERM, 1878.

When an appeal from a final decree in an Equity suit, granting or dissolving an injunction, is allowed by a justice or Judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party. [Promulgated Jan. 13, 1879; 97 U. S.]

XCIV.<sup>3</sup>

OCTOBER TERM, 1881.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a Court of the United States jurisdiction of a

<sup>1</sup> See *Bendey v. Townsend*, 109 U. S. 665, 668. The balance must be already payable. *Central R. Co. v. Central Trust Co.* 133 U. S. 83. See *ante*, p. 1043, notes.

<sup>2</sup> Under Rule 93, the judge who allows the appeal may give special notice that the injunction is to continue in force pending the appeal. *Leonard v. Ozark Land Co.* 115 U. S. 465. The injunction is not affected by the appeal. *Ibid.*; *Knox County v. Harshman*, 132 U. S. 14; 133 U. S. 152.

<sup>3</sup> See *Lafayette Co. v. Neely*, 21 Fed. Rep. 738; *Whittemore v. Amoskeag Nat. Bank*, 26 id. 819; *Lewarne v. Mexican Int'l Imp. Co.* 38 id. 629. This rule does not apply to a stockholder's suit not "founded on rights

which may properly be asserted by the corporation," but brought to restrain a corporate act, joining the president for discovery only. *Leo v. Union Pacific Ry. Co.* 17 Fed. Rep. 273. A plea is bad which sets up in defence a fact which the plaintiff must allege in his bill under Rule 94. *Garrett v. New York Transit & T. Co.* 29 Fed. Rep. 129. This rule has no technical force in cases removed from the State Courts, and the stockholder may prosecute the suit if from the entire record the corporation's failure to enforce its rights appears. *Evans v. Union Pacific Ry. Co.* 58 Fed. Rep. 497. See *ante*, pp. 26, note (a), 145, note (a), 559, note (b).



case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

*The following provisions relating to Equity Practice are to be found in the Act of 1st June, 1872:—*

SEC. 7. That whenever notice is given of a motion for an injunction out of a Circuit or District Court of the United States, the Court or Judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the Court or Judge: *Provided*, That no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order except within the circuit to which he is allotted, and in causes pending in the circuit to which he is allotted, or in such causes at such place outside of the circuit as the parties may in writing stipulate, except in causes where such application cannot be heard by the Circuit Judge of the circuit, or the District Judge of the district.

SEC. 13. That when in any suit in Equity, commenced in any Court in the United States, to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the Court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable, wherever found; or where such personal service is not practicable, such order shall be published in such a manner as the Court shall direct; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within such further time to be allowed by the Court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the Court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but such adjudication shall, as regards such absent defendant without appearance, affect his property within such district only.



GENERAL INDEX

AND

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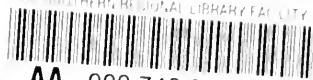




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